

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

869

34-4

JOINT APPENDIX

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,006

LODGE 1858, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES; EVERETT A. BROUILLETTE; EDWARD B. CAMPBELL; WILLIAM ELLETT; NEAL A. EASTER; ELMER GUNTER; DORIS RODEN, *Appellants*

v.

JAMES E. WEBB, Administrator, National Aeronautics and Space Administration; JOHN W. MACY, JR., Chairman, U.S. Civil Service Commission; LUDWIG J. ANDOLSEK, Commissioner, U.S. Civil Service Commission; ROBERT E. HAMPTON, Commissioner, U.S. Civil Service Commission, *Appellees*

and

NATIONAL COUNCIL OF TECHNICAL SERVICE INDUSTRIES,
Intervenor-Appellee

On Appeal From a Judgment of the United States District
Court for the District of Columbia

United States Court of Appeals

for the District of Columbia Circuit

FILED JUL 12 1968

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JOINT APPENDIX

Docket Entries

Date Filed

1967

Dec. 27—Complaint, Plaintiff's Ex. A, B, C, D, E.

Dec. 27—Motion for Preliminary Injunction.

Dec. 27—Points and Authorities in Support of Motion for Preliminary Injunction.

1968

Jan. 9—Affidavit in Support of Plaintiff's Motion for Preliminary Injunction.

Jan. 9—Plaintiff's Ex. F-K.

Jan. 10—Defendants' Opposition to Preliminary Injunction. Motion of National Council of Technical Service Industries for Leave to Intervene, with Affidavit, Intervenor's Ex. A, B, C, D & E. Points and Authorities in Support of Motion.

Jan. 10—Supplement to Defendants' Opposition to Preliminary Injunction.

Jan. 10—Affidavit of Plaintiff Brouillette in Support of Motion for Preliminary Injunction.

Jan. 11—Reply Brief of Plaintiffs in Support of Motion for Preliminary Injunction.

Jan. 11—Motion for Preliminary Injunction Argued and Granted, Holtzoff, J.

- Jan. 11—Motion of Intervenor to intervene granted, Holtzoff, J.
- Jan. 15—Findings of Fact and Conclusions of Law in support of Preliminary Injunction.
- Jan. 15—Order for Preliminary Injunction informally issued January 11, put into effect January 11, 1968.
- Jan. 17—Injunction Undertaking of Plaintiff Lodge 1858—\$1,000.
- Jan. 24—Transcript of January 15 proceedings filed.
- Feb. 9—Transcript of January 11 proceedings filed.
- Feb. 20—Defendants' Opposition to Order Allowing Intervention.
- Feb. 26—Motion of Government Defendants To Dismiss.
- Feb. 26—Defendants' Notice of Hearing of Motions To Vacate Preliminary Injunction and To Dismiss, Hearing To Be Held in Miami, Florida.
- Feb. 26—Order Granting Motion of Intervenor To Intervene.
- Feb. 26—Answer of Intervenor Filed.
- Mar. 7—Opposition of Plaintiffs to Defendants' Motion to Vacate Preliminary Injunction.
- Mar. 8—Intervenor's Points and Authorities in Support of Motion to Vacate Preliminary Injunction.

Mar. 11—Memorandum of Holtzoff, J. vacating preliminary injunction without prejudice to any administrative remedies that may be possessed by individual employees. Counsel to submit proposed findings of fact and conclusions of law and order (Order signed in Florida, Holtzoff, J. on 3-9-68).

Mar. 12—Findings of Fact and Conclusions of Law.

Mar. 12—Order vacating preliminary injunction without prejudice.

Mar. 27—Opposition of plaintiffs to defendants' motion to dismiss.

Apr. 1—Memorandum of intervenor in support of motion to dismiss.

Apr. 18—Judgment dismissing action, Holtzoff, J.

Apr. 23—Plaintiffs' Notice of Appeal.

Apr. 24—Order granting motion to dismiss.

Apr. 30—Cost bond on appeal.

May 20—Stipulation of omissions to record on appeal.

May 20—Transcript of April 9 proceedings filed.

Complaint for Declaratory Judgment and Injunction

Plaintiffs, by their attorney, Edward L. Merrigan, complaining of the defendants, respectfully allege:

1. Plaintiff, Lodge 1858 of the American Federation of Government Employees (hereinafter called Lodge 1858) is a labor organization of the United States Government employees employed at the George C. Marshall Space Flight

Center of the National Aeronautics and Space Administration (hereinafter referred to as NASA) and said plaintiff is a duly chartered local lodge of the American Federation of Government Employees which has been recognized by NASA as the exclusive bargaining agent under the provisions of Executive Order 10988 for all federal employees (other than management personnel, supervisory employees and the like) employed in a bargaining unit consisting of the entire George C. Marshall Space Flight Center; and in such capacity, plaintiff Lodge 1858 is a party to a collective bargaining agreement with the George C. Marshall Space Flight Center of NASA, copy of which is annexed hereto, made a part hereof and marked Exhibit A. This plaintiff therefore brings this suit for itself and in its own right and for and on behalf of all of the employees at the George C. Marshall Space Flight Center whom it represents as bargaining agent and who are threatened with grave and irreparable damage and loss by reason of the arbitrary, unlawful and capricious acts of the defendants hereinbelow alleged.

2. Plaintiffs Brouillette, Campbell, Easter, Ellett, Gunter and Roden are all civil service employees of the United States who are presently and for long periods of time in the past have been employed by the United States Government at the George C. Marshall Space Flight Center of NASA at Huntsville, Alabama; and all and each of them are fully entitled to the protections and benefits afforded such federal employees by the Civil Service laws and other related statutes of the United States and by regulations of defendant Civil Service Commission; and all and each of them is directly and immediately threatened with grave irreparable damage and loss by reason of the arbitrary, unlawful and capricious acts of the defendants hereinbelow alleged.

3. Defendant Webb is the Administrator of the National Aeronautics and Space Administration, an independent

agency of the United States Government, and in such capacity he is the head of NASA, and by reason of the provisions of Title 42 U.S.C. § 2472 (a) he is charged with the responsibility of supervising and directing NASA and he has full authority over all personnel employed by NASA and all other activities of that agency of the Government. Defendant Webb is therefore sued herein in his capacity as Administrator and because he has full authority and ability, upon order of this Court, to rescind, cancel, terminate and prevent the arbitrary, illegal and capricious actions and contracts which threaten the plaintiffs herein and all other federal civil service employees similarly situated at the Marshall Space Flight Center of NASA with grave and irreparable damage and loss.

4. Defendants Macy, Andolsek and Hampton are, respectively, the Chairman and Members of the Civil Service Commission of the United States, another independent agency of the United States Government, and as such Commissioners these defendants are charged with the duty and responsibility of administering the Civil Service laws and other related personnel statutes of the United States; of implementing these laws with rules and regulations which protect and preserve the integrity of the civil service system; of implementing the Congressional policy that preference shall be given to preference eligibles in certification for appointment and retention in the competitive service; and of investigating violations, evasions or circumventions of the Civil Service laws or regulations by other agencies or departments of the United States Government and they have the authority to take such actions as may be necessary, by report to the President or otherwise, to preserve the integrity of these laws and regulations and the federal civil service system generally. These defendants are therefore sued herein in their capacities as Civil Service Commissioners and because they also have authority and the ability, upon order of this Court, to direct the rescission, cancellation and termination of the arbi-

trary, illegal and capricious federal personnel actions and contracts of NASA which threaten the plaintiffs herein and all other civil service employees similarly situated at NASA's Marshall Space Flight Center with grave and irreparable damage and loss.

5. The jurisdiction of this Court over this action is based on the provisions of Title 28 U.S.C. §§ 1331 and 1346 (d); on the provisions of Sections 11-305, 11-306 of the District of Columbia Code (1961 Edition, as amended); on the provisions of the Administrative Procedures Act (5 U.S.C. § 702 et seq.) and upon those further statutes of the United States which give this Court jurisdiction to render declaratory judgments and to grant injunctive relief. Each of the claims herein asserted involves an amount in excess of \$10,000 exclusive of interest and costs.

6. Heretofore, and in or about 1958, Congress created and established the National Aeronautics and Space Administration (NASA) and directed NASA to plan, direct and conduct aeronautical and space activities for the Federal Government (42 U.S.C. 2472, 2473). Congress authorized NASA "to appoint and fix the compensation of such officers and employees as may be necessary to carry out such functions"; but Congress specifically provided, with very limited exceptions not here relevant, that "Such officers and employees shall be appointed in accordance with the civil service laws and their compensation fixed in accordance with the Classification Act of 1949 . . ." (42 U.S.C. § 2473(b)(2)).

Congress in the 1958 Act also expressly directed the Administrator of NASA, defendant Webb, to file annual reports with the Congress setting forth precisely how NASA was performing and adhering to the said personnel requirements and restrictions of the Act.

7. Thereafter, in or about 1960, NASA established and commenced to operate, as one of its functions under the

1958 Act, the George C. Marshall Space Flight Center at Huntsville, Alabama. In compliance with the aforementioned provisions of the Act pursuant to which NASA was created, NASA proceeded to fill almost all of the new positions of employment in its offices, laboratories, warehouses and facilities at the said Center with civil service employees of the United States appointed in accordance with the Civil Service laws which govern and control the appointment compensation and employment rights, benefits and obligations of federal employees. Prior to 1960, the facilities at Huntsville were operated by the U.S. Army Ballistic Missile Agency, and as part of the transfer of these facilities and its staff to NASA, a relatively small complement of non-civil service contractor employees was likewise transferred to the Marshall Center when NASA commenced operations there in 1960.

8. Thereafter and approximately two years later, however, NASA began very substantially to deviate from and ignore those Congressional directives and policies which required it to fill jobs at the new Marshall Center with federal civil service employees, and by alleging that it required the services of additional large numbers of "*temporary employees*" to meet unusual, urgent, temporary "peak workloads", NASA adopted the policy of soliciting and making written contracts with private business corporations (some of which were large; some small; some nationally prominent; some locally and suddenly organized or expanded in the Huntsville, Alabama area itself solely for the purpose of entering into personnel contracts with the Government) whereby said private corporations, for large fees and other very substantial and unusual profits, agreed simply to recruit and provide for employment at the Center itself clerical workers, blue collar tradesmen (mechanics, sheet metal workers, carpenters, plumbers, welders and the like), technicians, professional employees, guards, chauffeurs, truck drivers, etc.—most (if not all) of whom could have been just as readily obtained for em-

ployment at the Center through the regular procedures of the federal Civil Service laws and in accordance with the directions and policies of the Congress and the regulations of the Civil Service Commission, all, of course, without the intercession of any private contractors.

9. Under the terms of these contracts and in actual practice, none of the employees recruited and assigned to work at the Marshall Center by private personnel contractors had to be nor were they actually appointed or employed in accordance with the Civil Service laws of the United States. Nevertheless, such contractor-employees were assigned by NASA to work in the offices, laboratories, warehouses, vehicles and work shops at the Marshall Center side-by-side and in direct job competition with federal civil service employees of the United States and they were assigned to perform work which was identical or substantially identical to that already being performed by said federal civil service employees. In almost all instances, the Government (NASA) provided these contractor-employees with all of the tools and equipment they required to perform their duties at the Center right on down to and including such basic items as desks, paper and pencils; and of course, all such contractor-employees worked hand-in-hand with federal civil service employees at the Center to perform work exclusively for NASA and to accomplish the tasks and functions which had been assigned to NASA under the 1958 Act by the Congress. Indeed, in all instances, the work of the said federal civil service employees and private contractor-employees was actually subject to the same common direction, control and supervision of U.S. Government supervisors at the Center, and in each job occupation, all worked the same shifts and were subject to identical working conditions.

10. At the same time, however, the concomitant, intermingled employment of federal civil service employees and private contractor-employees to perform substantially the same work for the Government at the Marshall Center dis-

criminated against and placed the federal civil service employees involved at great, improper, unlawful disadvantages in numerous very material respects, including such essential matters as eligibility for employment and appointment to substantially the same jobs; rates of pay; pay increases; performance ratings, and the right to bargain with management regarding terms and conditions of employment. Such intermingling of federal and contractor employees in the same work at the Center also led to serious, fatal erosions of the civil services employees' job retention rights under the federal Veterans' Preference Act and it led to very significant disparities in such matters as annual leave (vacations), sick leave, disability compensation, retirement benefits, insurance benefits, travel and relocation allowances, and in rights to inventions and patents flowing from their work on substantially the same jobs at the Center.

11. Moreover, the permanent introduction by NASA of thousands of contractor-employees into federal jobs within the aforementioned collective bargaining unit established at the Marshall Center seriously interfered with, diluted and tended to defeat the collective bargaining rights of all civil service employees at the Center under the provisions of Executive Order 10988 promulgated by President Kennedy in January, 1962, and it interfered with, diluted and tended to defeat the lawful rights of plaintiff, Lodge 1858 of the American Federation of Government Employees, and the federal employees represented by it at the Center, under the collective bargaining agreement made with NASA, copy of which is annexed hereto as Exhibit A. Indeed, by constantly removing federal jobs from that bargaining unit and by transferring same to numerous contractor-employees, NASA weakened and tended to defeat the valid collective bargaining rights of all of the employees involved, civil service and contractor-employees as well.

12. Finally, the simultaneous intermingled employment of federal civil service employees and private contractor-

employees to perform substantially the same jobs throughout the Center seriously discriminated against the civil service employees involved in that, by law, they were prohibited from striking against NASA with reference to any conditions of their employment, while the contractor-employees, performing the same federal work at the Center, were free at any time to strike against their employers, the private contractors and thus to disrupt or possibly halt, contrary to federal policy, the Government's work at the Center. And, of course, while federal civil service employees at the Center were constantly subject to all of the restrictions and prohibitions of the Hatch Act, contractor employees working for the Government at the Center were in no respect subject thereto or limited thereby.

13. In spite of the foregoing and in spite of the clear-cut total illegality of these arrangements and opposition from large numbers of federal civil service employees at the Center and from plaintiff Lodge 1858 of the American Federation of Government Employees, NASA proceeded over the period from in or about 1962 to 1967 to expand and extend its contract arrangements with private personnel contractors so that by the end of 1966—

(a) approximately 45% of all employees performing NASA's work at the Marshall Space Flight Center were furnished by private personnel contractors; more specifically, NASA employed approximately 7,300 civil service employees at the Center and approximately 5,900 contractor-employees;

(b) NASA had separate contracts with no less than 12 personnel contractors, the main function of each being to furnish *non* civil service employees at the Marshall Center, and included among such contractors were private corporations listed as Brown Engineering Company, Inc. of Huntsville, Alabama; Spaco, Incorporated of Huntsville, Alabama; Northrop Corporation of Huntsville, Alabama; Hayes International Corporation of Birmingham, Alabama;

Rust Engineering Corporation; Vitro Corporation; Management Services, Inc. of Tennessee; Sperry Rand Corporation and Federal Electric Corporation; and upon information and belief, by 1966, contracts—all "*cost plus award, fee*" contracts—involved the expenditure by NASA at the Marshall Center of approximately \$70,000,000. per year for simple personnel contractor services;

(c) All guard positions at the Marshall Center, originally filled exclusively by civil service employees, were by 1966 entirely filled by contractor employees in spite of the fact that Congress had specifically provided (at 5 U.S.C. 3310) that competition for "guard positions" shall always be "restricted to veterans preference eligibles";

(d) All truck driver and chauffeur positions, originally filled by civil service employees, were by 1966, completely filled by contractor employees;

(e) contractor employees had been integrated into every office, laboratory and facility at the Center with the possible exception of some of the Headquarters Offices at Huntsville, so that, as of late 1966 or early 1967, each office, laboratory and facility at the Center employed side by side civil service employees and contractor employees, who, in each case, both performed substantially the same work, under common U.S. Government supervisors, in the same working conditions and surroundings, and with materials, tools and equipment supplied by the Government. In the *Management Services Office*, for example, approximately 189 civil service employees worked with 671 employees furnished by the RCA Service Company; in the *Technical Services Office*, 534 civil service employees worked side by side with 476 employees furnished by Management Services Inc. of Tennessee; in the *Manufacturing Engineering Laboratory*, 715 civil service employees (including professionals, technicians, clerical employees and blue collar tradesmen) worked with 238 employees furnished by Hayes International Corporation (including professionals, tech-

nicians, clerical employees, and blue collar tradesmen); in the Test Laboratory, 630 civil service employees worked with 476 employees furnished by Vitro Corporation; and in the Propulsion and Vehicle Engineering Laboratory, 740 civil service employees worked alongside 772 employees furnished by Brown Engineering Company of Huntsville, Alabama—again all performing common work assigned, directed and supervised by civil service employees of NASA.

14. In the meantime, while NASA was continuing consistently to extend and expand its illegal and improper personnel contracting arrangements at the Marshall Flight Center in Huntsville, substantially identical personnel contracts made by NASA at its Goddard Space Flight Center came under vigorous investigation by both the General Accounting Office of the United States and the Civil Service Commission. At the conclusion of these investigations which extended over the period from late 1962 to early 1964, both the Commission and the General Accounting Office ruled that NASA's personnel contract practices at Goddard violated both the Civil Service laws and the Classification Act of 1949, as amended. In a subsequent report to Congress dated October 19, 1964, copy of which is annexed hereto, made a part hereof and marked *Exhibit B*, the Commission and the General Accounting Office reported that NASA's personnel contracts at Goddard were in serious violation of the civil service laws "because a relationship tantamount to that of employer-employee was created between the Government and contractor employees". Both the Commission and the General Accounting Office thereupon directed NASA in substance that "personal services necessary to perform a Government function are for performance by regular employees of the Government appointed and compensated in accordance with the civil service and classification laws; and that in the absence of specific authority from the Congress, a Federal agency is not authorized to contract for personal services without

regard to the personnel laws applicable to Federal employees generally."

15. Upon receipt of these rulings and advice from both the Civil Service Commission and the General Accounting Office in 1964, NASA assured the Civil Service Commission that all necessary corrective actions would be taken at its various installations and that henceforth NASA would fully comply with all federal personnel statutes in the operation of its Space Flight Centers.

16. Contrary to these assurances and undertakings, however, NASA actually continued to administer and expand its intermingled civil service-contractor personnel systems at both the Goddard and Marshall Space Flight Centers without substantial change. Hence, numerous complaints continued to be filed by members of Congress and civil service employees with both the Civil Service Commission and the General Accounting Office, with the result that, in 1965 and 1966, the Commission again questioned the propriety of contracting practices at Goddard and undertook an over-all inspection of NASA personnel practices. In the meantime, the General Accounting Office commenced brand new investigations of NASA's personnel contracts at both Goddard and Marshall.

17. Thereafter, on June 9, 1967, the Comptroller General of the United States rendered another report to Congress regarding the General Accounting Office's investigation of NASA's said personnel contracts, copy of which is annexed hereto, made a part hereof and marked *Exhibit C*. In the course of the said Report, entitled "*Report On Potential Savings Available Through Use Of Civil Service Rather Than Contractor-Furnished Employees For Certain Support Services—NASA*", the General Accounting Office specifically stated, at page 27:

"On the basis of our review, we believe the contractual documents were drawn so as to avoid creating an employer-employee relationship between Govern-

ment supervisors and contractor-personnel, thereby providing compliance with applicable civil service laws. In the administration of the contracts, however, there were indications that certain . . . actions were in essence creating an employer-employee relationship and, therefore, possible violations of applicable laws."

And, in his letter to the Congress dated June 9, 1967, the Comptroller General stated:

"Our review of the relative costs of obtaining the necessary services through the use of support contracts and through the use of civil service employees showed that estimated annual savings of as much as \$5.3 million could be achieved with respect to the [9] contracts we reviewed at Goddard and Marshall if these services were to be performed by civil service employees . . .

"The indicated savings are attributable, for the most part, to the elimination of many contractor supervisory and administrative personnel, which would result from a conversion to civil service staffing and the elimination of the fees paid to the contractors."

18. Thereafter, in or about October, 1967, the General Counsel to the Civil Service Commission, after conducting an exhaustive study of NASA's standard form of personnel contracts in use at both Goddard and Marshall rendered a detailed written opinion for the Civil Service Commission and NASA with reference to the legality of same, and a copy of that formal opinion is annexed hereto, made a part hereof and marked Exhibit D. After thoroughly considering these contracts and NASA's day-to-day operations thereunder, the General Counsel's opinion concluded, at pages 34; et seq:

"NASA has no legal authority to contract for personal services without regard to the personnel laws. Congress has enacted various laws to govern the acquisition, maintenance, and severance of the employer-employee relationships between a Federal agency and

an individual (see title 5, United States Code). These laws apply unless a clear exception can be found in some other statute or other legal authority . . .

"We have found no authority under which NASA is authorized to contract for personal services without regard to the Code of Personnel Laws . . .

"The contracts under review are unauthorized . . . Realistically viewed, the contracts result in the procurement of personnel in violation of the requirements and policies of the personnel laws as administered by the Commission. Such practices have an adverse effect upon the civil service system . . . and detract from sound manpower utilization practices and objectives within the Executive Branch.

"The contracts under review do not conform to Executive Branch policy as prescribed in Bureau of Budget Circular A-76 . . . Whether contracts for services depart from civil service laws or the regulations of the Civil Service Commission is a matter for determination by the Civil Service Commission. Having concluded that the contracts in question are in violation of these laws, it follows that they also transgress the policy prescribed for the Executive Branch . . .

"The Civil Service System can supply the necessary personnel . . .

"Applying these standards, the contracts under review and all like them are proscribed (by the personnel laws) unless an agency possesses a specific exception from the personnel laws to procure personal services by contract."

19. Upon information and belief, copies of the last mentioned report of the Comptroller General and opinion of the General Counsel to the Civil Service Commission were transmitted by these two agencies of the Federal Government to defendant Webb and other top officials of NASA in Washington and at the Marshall Space Flight Center in Huntsville, Alabama; and upon receipt and review of same the General Counsel for NASA advised the Civil Service

Commission in or about September, 1967 in writing as follows:

"... we plan to rectify all these violations. If they cannot be remedied, NASA will take all necessary action to have these functions performed by Civil Service employees."

20. Shortly thereafter, however, and (a) before any effective actions whatsoever were taken by defendant Webb or any other officials of NASA to terminate or cancel or to limit any of the twelve or more totally unlawful personnel contracts still in full force and effect with private corporate contractors at the Marshall Flight Center and (b) before any steps were taken to terminate the illegal employment of thousands of non-civil service employees of these private contractors who are unlawfully working for the Government through these private personnel contractors at the Marshall Flight Center in violation of the Civil Service Laws and of the 1958 Act pursuant to which NASA itself was created by the Congress and (c) before any step was taken by defendant Webb to cancel and eliminate the millions of dollars in illegal and totally unnecessary fees and profits which NASA, contrary to the report and recommendations of the Comptroller General hereto annexed, is still paying these private corporate contractors to furnish non-civil service employees to fill Government positions at the Center—defendant Webb and other top officials of NASA at the Marshall Center announced, on or about November 29, 1967, that allegedly because Congress cut NASA's fiscal 1968 budget by about one-half billion dollars, NASA would reduce its existing force of civil service employees at the Marshall Flight Center by approximately 640 jobs, such reduction to include civil service employees with valid job retention preference rights in all categories of employment, to wit, in professional positions at the Center, technicians, in clerical and secretarial positions, and in blue collar-wage board positions (mechanics, ma-

chinists, carpenters, plumbers, sheet metal workers and the like).

21. Thereafter, and on or about December 6, 1967, the individual plaintiffs Brouillette, Campbell, Ellett, Easter, Gunter and Roden and approximately 600 other civil service employees employed in the collective bargaining unit covered by the collective bargaining contract between NASA and plaintiff Lodge 1858 of the American Federation of Government Employees, *Exhibit A* hereto, received written Reduction-in-Force notices from NASA notifying them that they would be separated from their positions and discharged from Government service effective January 13, 1968; and in some cases, said employees were notified that, in lieu of separation, they would, effective January 13, 1968, be removed from their current positions, they would be reduced to inferior positions and thus reduced very substantially in grade and rate of pay—all without any fault whatsoever on their part and after long periods of faithful, satisfactory service to NASA and the United States Government.

22. Plaintiffs allege that each of these proposed reduction-in-force actions is unlawful, unjust and completely in violation of the individual plaintiffs' rights and the rights of all other civil service employees in the aforementioned collective bargaining unit who are included in the said proposed reduction. More specifically, plaintiffs allege that said removals and reductions in grade and pay violate Title 5 United States Code, Sections 3501 et. seq., entitled "Government Employees Retention Preference Rights", and the Civil Service Commission regulations thereunder (5 C.F.R. 351 et seq.) entitled "Reductions in Force", in that plaintiffs and all of the other civil service employees included in said reduction are to be removed from their positions at the Center when, in each instance, non-civil service employees of the various private corporate contractors listed above, working side by side with these civil service em-

ployees and performing substantially the same work for the Government on the Government's premises at the Center, with the Government's tools and equipment and with common Government supervisors (*but who possess no job retention rights whatsoever under Title 5 of the United States Code and who are employed under contracts the Civil Service Commission has ruled are proscribed by federal law*), are to be retained in their said positions without any loss of pay whatsoever.

23. In the case of plaintiff Brouillette, he alleges it is totally unlawful and violative of his civil service job retention rights under Title 5 of the United States Code and the Civil Service Commission regulations thereunder for NASA to propose to remove him from his position as a Grade GS-12 Industrial Specialist in the Planning and Engineering Branch of the Manufacturing Engineering Laboratory at the Center, without any fault whatsoever on his part and after 21 years of faithful, satisfactory service to the Government (for which he possesses very substantial federal civil service job retention credits and rights under Title 5 of the United States Code), while NASA simultaneously proposes to continue to retain in employment, in the very same branch and laboratory at the Center, numerous employees of the Hayes International Corporation, none of whom possess any federal job retention rights whatsoever under Title 5 of the United States Code or otherwise and all of whom have performed and will continue to perform substantially the same work for the Government as that heretofore performed by plaintiff Brouillette and some of whom (heretofore trained for their work by this plaintiff) will, after the said plaintiff's removal, succeed to and perform the work heretofore performed by said plaintiff for the Government.

24. In the case of plaintiffs Campbell and Ellett, they allege it is totally unlawful and violative of their civil service job retention rights under Title 5 of the United States Code

and the Civil Service Commission regulations thereunder for NASA to propose to remove them from their positions as aeromechanics in the Propulsion and Vehicle Engineering Laboratory at the Center, without any fault whatsoever on their part and while they are satisfactorily performing their duties as civil service aeromechanics for the Government, while NASA simultaneously proposes to continue to retain in employment in the very same work in the very same laboratory at the Center numerous other non-civil service, mechanic employees of the Brown Engineering Company, none of whom possess any federal job retention rights whatsoever under Title 5 of the United States Code or otherwise, and all of whom have performed in the past and will continue to perform after January 12, 1968 (indeed they will succeed to) the very same work as that heretofore performed for the Government by plaintiffs Campbell and Ellett.

25. In the case of plaintiff Easter, he alleges it is totally unlawful and violative of his civil service job retention rights under Title 5 of the United States Code and the Civil Service Commission regulations thereunder for NASA to propose to remove him and all other non-supervisory civil service instrumentation mechanics in the Control Branch of the Electrical and Instrumentation Section of the Test Laboratory at the Center from their civil service positions with the Government, without any fault on his part after 12 years of satisfactory service to the Government and without any fault on the part of any of the other civil service mechanics involved, while NASA simultaneously proposes to retain in employment in the Control Branch the existing eight civil service Government supervisors and simply to replace the removed non-supervisory mechanics with non-civil service mechanic employees of the Brown Engineering Company, none of whom possess any federal job retention or replacement rights whatsoever under Title 5 of the United States Code or otherwise, and all of whom will, as instrumentation mechanics, continue to

perform after January 12, 1968 (indeed they will simply succeed to) the very same work heretofore performed for the Government at the Center by plaintiff Easter and the other civil service mechanics mentioned above.

26. In the case of plaintiff Gunter, he alleges it is totally unlawful and violative of his civil service job retention rights under Title 5 of the United States Code and the Civil Service Commission regulations thereunder for NASA to propose to remove him from his position as an Industrial Specialist, Research and Development, in the Manufacturing Engineering Laboratory at the Center, without any fault whatsoever on his part and after 29 years of good, satisfactory, faithful service to the Government (for which he has accumulated very substantial civil service job retention rights under Title 5), while NASA simultaneously proposes to continue to retain in employment in the very same work in the very same laboratory and section at the Center numerous other non-civil service employees of Hayes International Corporation, none of whom possess any federal job retention rights whatsoever under Title 5 of the United States Code or otherwise, and all of whom have performed in the past and will continue to perform after January 12, 1968 (indeed they will succeed to) the very same work as that heretofore performed for the Government by plaintiff Gunter.

27. In the case of plaintiff Roden, she alleges it is totally unlawful and violative of her civil service job retention rights under Title 5 of the United States Code and the Civil Service Commission regulations thereunder for NASA to propose to remove her from her position as a Digital Computer Operator in the Computation Laboratory at the Center along with other civil service employees working with her in that Lab, without any fault whatsoever on her part after 21 years of good, satisfactory, faithful service to the Government (for which she has accumulated very substantial civil service job retention rights under Title 5)

or on the part of any of the other civil service computer operators to be removed with her, while NASA simultaneously proposes to continue to retain in employment on three daily, around-the-clock shifts in the very same work on the very same computers at the Center numerous other non-civil service computer operators of Computer Sciences Corporation, none of whom possess any federal job retention rights whatsoever under Title 5 of the United States Code or otherwise, and all of whom have performed in the past and will continue to perform after January 12, 1968 (indeed they will succeed to) the very same work as that heretofore performed for the Government by plaintiff Roden and the other civil service computer operators hereinabove referred to.

28. Plaintiff Lodge 1858 of the American Federation of Government Employees alleges further that—

(A) NASA's aforesaid proposal to remove hundreds of civil service employees of the United States employed within the collective bargaining unit Lodge 1858 represents at the Marshall Space Flight Center violates not only Title 5 of the United States Code and the Civil Service reduction-in-force, job retention regulations thereunder but same also violates the terms and spirit of Executive Order 10988 issued by President Kennedy in January, 1962 and the terms and conditions of the collective bargaining agreement between NASA and Lodge 1858 (*Exhibit A* hereto) in the following respects:

(i) Article XVI of such agreement, entitled "*Reduction In Force*" provides: "All reductions in force will be carried out in strict compliance with applicable laws and regulations." As herein more specifically set forth, plaintiff Lodge 1858 alleges that the proposed reduction in force scheduled for January 12, 1968 at the Marshall Space Flight Center is *not* being carried out "in strict compliance with applicable laws and regulations"; on the contrary, same is in violation of applicable laws and regulations;

(ii) Articles IV and XVI of such agreement entitled "*Consultation*" and "*Reduction In Force*" specifically provide that "reduction-in-force" practices are matters "appropriate for consultation" between NASA and Lodge 1858 and NASA undertook and agreed therein "to notify the Union in advance of reduction-in-force actions at which time the Union may make its views and recommendations known concerning the implementation of such reduction-in-force actions". In violation of the letter and spirit of these provisions of the contract, NASA arbitrarily and capriciously decided unilaterally and without any bona fide, meaningful consultation with plaintiff Lodge 1858 how the reduction-in-force scheduled for January 12, 1968 will proceed and that hundreds of civil service employees within the bargaining unit at the Center will be removed from their jobs, and at no time has NASA sought or given any attention whatsoever to Lodge 1858's views and recommendations regarding same.

(B) The various contracts at the Marshall Space Flight Center in Huntsville, pursuant to which NASA has hired the private corporate contractors mentioned hereinabove and others, for large fees and other improper, unreasonable and uncalled for profits, fees and charges, to procure, obtain and supply non-civil service employees to perform NASA's regular day-to-day work and functions for the Government, such services being performed by the contractors non-civil service employees "on-site" at the Marshall Flight Center, side-by-side and in direct competition with regular civil service employees of the United States performing substantially the same work; and such work being performed by the said contractors' employees with tools and equipment and working space furnished by the Government at its own expense and pursuant to directions and supervision simultaneously supplied by the Government to both the civil service and contractor employees involved—are totally unlawful and in violation of the National Aeronautics and Space Act of 1958, as amended (42

U.S.C. 2473 (b)(2)) and Title 5 of the United States Code; and same are violative of the public policy of the United States expressed and maintained over scores of years in the civil service laws, the Hatch Act and other related Acts of the Congress which regulate and prescribe the rules intended to govern all federal employees in their work and activities and to preserve the integrity of the Civil Service System of the United States.

(C) The thousands of non-civil service contractor employees presently employed and who will continue to be employed after January 12, 1968 at the Marshall Space Flight Center pursuant to the aforementioned contracts between NASA and the corporations hereinabove referred to are illegally, unlawfully and improperly performing and will continue so to perform work and functions for the United States Government which must, as a matter of law, be performed by civil service employees of the United States who are readily obtainable through the Civil Service System regulated by defendant Civil Service Commissioners; and therefore, NASA, while continuing unlawfully to retain these thousands of non-civil service contractor employees in positions of employment at the Center in direct competition with civil service employees of the United States, may not lawfully remove any of the said civil service employees from their jobs, without just cause and solely to effectuate an alleged "economy", when such "economy" could readily be obtained many times over by terminating and phasing out the unlawful contracts hereinabove described.

(D) The proposed reduction-in-force further violates defendant Civil Service Commission's regulations in that the "competitive area", (to wit, the entire installation at Huntsville; all of NASA's facilities at Michoud, New Orleans, Picayune, Mississippi and at various places in California) arbitrarily and capriciously selected by NASA for selecting civil service employees for reduction and removal

is beyond "the local commuting area" for civil service employees in Huntsville, and upon information and belief, NASA has neither obtained nor exhibited authority from Congress or the Civil Service Commission lawfully to utilize the sprawling "competitive area" described above for the reductions-in-force herein complained of.

29. Upon receipt of the aforementioned Notices of proposed reductions-in-force from NASA, the individual plaintiffs and their union, the American Federation of Government Employees, immediately appealed to defendant Webb and urged him to cancel or delay these proposed illegal removals. Thereafter, and on or about December 12, 1967, defendant Webb's Director of Personnel replied in substance as follows (*Exhibit E* hereto):

"... It is painful but necessary in some instances to use reduction-in-force procedures. In order to effect the economies required we must begin these as early as possible. Unfortunately, therefore, we have no alternative and must issue the advance notices of the reduction-in-force at this time ...

"We sincerely regret the adverse consequences which some of our employees may be required to face ..."

30. Plaintiffs and their union thereupon appealed to defendant Civil Service Commissioners and urged them in line with their General Counsel's opinion of October, 1967, to intercede and stop these proposed illegal reductions-in-force scheduled by NASA at the Marshall Space Flight Center for January 12, 1968. Thereafter, however, on December 12, 1967, defendant Macy, acting for the Commission, responded by telegram stating the Commission was powerless to intercede or to stop the proposed civil service employee removals because allegedly "NASA is solely responsible" for these actions.

31. Plaintiffs therefore verily believe and allege that defendant Webb and the federal agency he administers, un-

less enjoined by this Court in this action, will, without further notice or delay, proceed on or about January 12, 1968 unlawfully to strip the individual plaintiffs to this action and hundreds of other civil service employees in the collective bargaining unit represented by plaintiff Lodge 1858 at the Marshall Space Flight Center of both their federal civil service positions with the Government and their lawful job retention rights under Title 5 of the United States Code and the Civil Service Commission regulations thereunder while defendant Webb and the agency he administers simultaneously continue to employ, under and pursuant to illegal contracts proscribed by law, thousands of non civil service employees at the Center, hundreds of whom will succeed to the work and services heretofore performed for the Government by the plaintiffs and those other civil service employees thus unlawfully removed from their positions; and plaintiffs further allege that they have no adequate remedy at law to prevent the severe, irreparable injury, damage and loss they will immediately sustain on and after January 12, 1968 as a direct result of these unlawful actions of this defendant.

32. Plaintiffs also verily believe and allege that defendant Civil Service Commissioners, unless mandatorily directed and enjoined by this Court in this action, will likewise continue to fail and refuse to take any effective action of any kind under and pursuant to Title 5 of the United States Code, the opinion of their own General Counsel rendered in October, 1967 or otherwise, to intervene with defendant Webb and NASA prior to January 12, 1968 to prevent, delay or stop the aforesaid reduction-in-force and the removal of the individual plaintiffs and the hundreds of other civil service employees involved from their lawful positions in the Civil Service System of the United States; and thus said defendants will, by their intentional failure and refusal to act, effectively permit NASA unlawfully to remove these civil service employees from their positions while NASA continues to fail and refuse to cancel, termi-

nate or phase out of the unlawful personnel contracts hereinabove referred to and while NASA continues after January 12, 1968 unlawfully to employ thousands of non civil service employees at the Marshall Space Flight Center illegally to perform work for the United States and to succeed to and perform work heretofore performed for the Government by the individual plaintiffs and the other removed civil service employees in the collective bargaining unit at the Marshall Space Flight Center; and again plaintiffs allege that they have no adequate remedy at law to prevent the severe, irreparable injury, damage and loss they will immediately sustain on and after January 12, 1968 as a direct result of these defendants' failure and refusal to protect the Civil Service System and the civil service employees here involved against the unlawful, arbitrary and capricious contracts and actions of NASA hereinabove referred to.

WHEREFORE, plaintiffs pray:

I. That this Court enter a declaratory judgment herein—

(A) Declaring that under the facts and circumstances set forth in this complaint and established in this action, defendant Webb and the National Aeronautics and Space Administration he administers are prohibited by (i) the National Aeronautics and Space Act of 1958 (42 U.S.C. 2473 (b)(2)), (ii) Title 5 of the United States Code (entitled "Government Organization and Employees") and (iii) the reduction-in-force and federal civil service system job retention regulations of the Civil Service Commission from removing, without cause, any of the individual plaintiffs or any of the other civil service employees presently employed in the collective bargaining unit at the Marshall Space Flight Center represented by plaintiff Lodge 1858 of the American Federation of Government Employees from their positions with NASA as part of the currently unlawful proposed reduction-in-force at the Marshall Space Flight Center, and

(B) Declaring further that defendant Webb and the National Aeronautics and Space Administration he administers pursuant to the National Aeronautics and Space Act of 1958, as amended, are prohibited (i) by the provisions of that Act (42 U.S.C. 2473 (b)(2)) and (ii) by the language, spirit and intent of Title 5 United States Code (including but not limited to 5 U.S.C. 2101 et seq.; 3101 et seq.; 3104; 3109; 3301 et seq.; 3310; 3317; 3318; 3319; 3321; 3322; 3323; 3324; 3325; 3332; 3333; 3361 et seq.; 3501 et seq.; 4101 et seq.; 4301 et seq.; 5101 et seq.; 5301 et seq.; 5504 et seq.; 6102; 7311; 7312 et seq.; 7352 et seq.; 7501 et seq.; 7531 et seq.) and (iii) the regulations of the Civil Service Commission promulgated thereunder from continuing to make, extend, and perform contracts at the Marshall Space Flight Center with private firms or corporations pursuant to which such firms or corporations undertake and agree, for substantial fees, profits and charges, to furnish and do furnish non-civil service employees to perform "on-site" at the Center regular work and functions of the Government (NASA); side-by-side and in competition with civil service employees of the United States who are obligated to perform and do perform substantially the same or similar work and functions of the Government, both classes of employees performing their duties in offices, laboratories and other space or vehicles provided by the Government at its own expense; with tools, equipment and supplies furnished by the Government; and pursuant to directions and common supervision supplied by the Government and civil service supervisors; and

(C) Declaring further that, under the facts and circumstances set forth in this complaint and established in this action, defendant Webb and the National Aeronautics and Space Administration he administers are prohibited and precluded by Executive Order 10988 and the collective bargaining agreement between

NASA and plaintiff Lodge 1858 of the American Federation of Government Employees (*Exhibit A* hereto) from removing, without cause, any of the individual plaintiffs or any of the other civil service employees presently employed in the collective bargaining unit represented by said Lodge 1858 at the Marshall Space Flight Center from their positions with NASA as part of the currently unlawful proposed reduction-in-force; and

II. That, in order to prevent immediate and irreparable injury, damage and loss to the individual plaintiffs herein, to plaintiff Lodge 1858 of the American Federation of Government Employees, and to the other hundreds of civil service employees in the collective bargaining unit at the Marshall Center represented by plaintiff Lodge 1858, for which none have any adequate remedy at law, this Court grant an appropriate temporary restraining order, if necessary, and preliminary and permanent injunctions herein—

(A) Restraining and enjoining defendant Webb, the Agency he administers and its officers, agents, attorneys and employees from taking any further step or action of any nature or kind to remove, without cause and as part of the reduction-in-force currently proposed, any of the individual plaintiffs herein or any of the other civil service employees presently employed in the collective bargaining unit at the Marshall Space Flight Center represented by plaintiff Lodge 1858 from their positions with NASA at the Center, so long as non-civil service employees obtained by NASA under contracts with private corporations continue to be employed on-site at the Marshall Space Flight Center in Huntsville to perform work and functions for the Government substantially identical or similar to that performed by any civil service employee proposed for removal by NASA, with tools, equipment and supplies furnished by the Government

and pursuant to directions and supervision supplied by the Government and its supervisors at the Center; and

(B) Directing and ordering defendant Civil Service Commissioners, within the scope of authority conferred upon them by Title 5 of the United States Code and otherwise, to take such steps as may be necessary, during the pendency of this action and permanently, to enforce and administer the federal civil service and personnel statutes and its own regulations in such manner as to prohibit defendant Webb and the agency he administers from continuing to make and perform personnel contracts with private corporations pursuant to which said corporations, for large fees and profits, do no more than furnish non civil service employees to NASA's Marshall Space Flight Center to perform functions of the Government which, as a matter of law, must and should be performed by civil service employees who are readily available for employment through the regular channels of the Civil Service System of the United States; and from utilizing such contracts as a means of obtaining non-civil service job replacements for civil service employees unlawfully removed from their positions with the United States; and

III. That the Court grant such other and further relief as may seem just and proper and as the exigencies of this case may demand.

EDWARD L. MERRIGAN
Attorney for Plaintiffs
1700 Pennsylvania Avenue, N.W.
Washington, D. C.

VERIFICATION

CITY OF WASHINGTON }
DISTRICT OF COLUMBIA } ss

Clyde M. Webber, being duly sworn, deposes and says that he is the Executive Vice President of the American Federation of Government Employees and the officer of the Federation designated by plaintiff Lodge 1858 of the American Federation of Government Employees to file and verify this complaint in its behalf, and in that capacity deponent verifies that he has read the foregoing complaint and hereby states the allegations contained therein are true and correct to the best of his knowledge, information and belief.

Sworn to and subscribed
before me this 27th day of
December, 1967

.....
Notary Public

Motion for Preliminary Injunction

Come now the plaintiffs herein and they respectfully move this Court to grant a preliminary injunction restraining and enjoining defendant James E. Webb, Administrator of the National Aeronautics and Space Administration, his officers, agents, attorneys and employees from taking any further step or action during the pendency of this action to remove, without just cause and as part of the currently pending proposed reduction-in-force at the Marshall Space Flight Center, any of the individual plaintiffs to this action or any other civil service employees employed in the collective bargaining unit at the Marshall Space Flight Center in Huntsville, Alabama represented by plaintiff Lodge 1858 of the American Federation of Government Employees from the positions they presently hold at the said Center in Huntsville, Alabama, or to re-

duce any such federal employees in grade or rate of pay or compensation; and in support of this motion, plaintiffs direct the Court's attention to the verified complaint herein, the exhibits thereto annexed, including the October, 1967 Opinion of the General Counsel to defendant Civil Service Commissioners; and to the Statement of Points and Authorities filed herewith.

WHEREFORE, plaintiffs pray that the Court will hear this motion promptly and that, upon such hearing, issue a Preliminary Injunction as requested and thereby preserve the *status quo* until this action can be heard and determined on its merits.

EDWARD L. MERRIGAN
Attorney for Plaintiffs
 1700 Pennsylvania Avenue, N. W.
 Washington, D. C. 20006

**Affidavit in Support of Plaintiffs' Motion for
 Preliminary Injunction**

CITY OF WASHINGTON }
 DISTRICT OF COLUMBIA } ss

Everett A. Brouillette, being duly sworn, deposes and says:

1. I am one of the individual plaintiffs in this action and I submit this affidavit in support of plaintiffs' motion for a preliminary injunction.

2. I have been advised by my attorney in this action that the Honorable Harold B. Finger, Associate Administrator for Organization and Management of the National Aeronautics and Space Administration (NASA), has submitted an affidavit in this action in opposition to the motion for preliminary injunction in which he states, at Page 7:

"At present, NASA is aware of no instances at Marshall Space Flight Center where civil service em-

employees are working side-by-side with contractor personnel performing the same duties. However, if the facts developed on the Civil Service appeals of the individuals concerned, or our own continuing evaluation, show any instance where a civil service employee being separated is working side-by-side with, and performing the same duties as a contractor employee, appropriate corrective action will be taken. Further, in any instance in which the Civil Service Commission sustains the appeal, we will of course reinstate the separated employee with back pay in accordance with law".

3. As the Verified Complaint in this action shows, I am presently employed as a civil service employee in the Planning and Engineering Branch of the Mechanical Engineering Laboratory at Marshall Space Flight Center, Huntsville, Alabama, in Building No. 4709, and I perform the functions of an industrial specialist for NASA. I have been performing this work for NASA for the past six years. In the Complaint, it is alleged that non-civil service employees of the Hayes International Corporation are employed in my very office to work side-by-side with me and the other civil service employees in my office on exactly the same work for NASA. Indeed, up to now, all of these employees, civil service and non civil service alike, have been subject to the direction and control of the same civil service supervisors. In order to demonstrate this fact to the Court beyond any question of doubt, I am attaching hereinbelow a photograph which shows my office in Building 4709 at the Marshall Space Flight Center as it appeared up to and including last Friday, January 5, 1968. My desk is shown at the front lefthand corner of this photograph; the other employees shown in the photograph are civil service employees of the United States performing exactly the same work I perform for the Government; and in the middle of the photograph is a tem-

porary, movable partition bearing the sign "Contractor Operated Facility—Hayes International Corporation". Beyond that partition and less than five feet from the civil service employees' desks shown, work six employees of the Hayes International Corporation, all of whom have heretofore been performing exactly the same work as that performed by me and the other civil service employees involved.

4. Last Friday, January 5, 1968, that is, just before Mr. Finger apparently signed his affidavit in this case on January 8, 1968, all of the Hayes International Corporation employees located in my office were suddenly told to pack all of their belongings and workpapers in boxes so that they could be moved out of this office to the HIC Building in downtown Huntsville, Alabama. That afternoon, prior to 3:30, all of the Hayes employees in my office packed their belongings into these boxes, and upon information and belief, on Saturday, January 6, all of those boxes, containing the said belongings and workpapers, were moved to the said HIC Building. Upon information and belief, these employees of Hayes International Corporation, none of whom possess any job retention rights whatsoever under Federal law and who are performing work exactly the same as heretofore performed by me and my associate civil service employees in my office, are continuing at the HIC Building to perform the very same work for NASA and are subject to the same overall supervision of the supervisors located at the Center. These evasive practices are proceeding while two of the civil service employees shown in the above picture, with approximately twelve and nineteen years of civil service retention rights respectively, are being discharged and dismissed. Two other employees located in this same small office, but not shown in the picture, with equally long retention rights under the Federal Civil Service laws, are also being dismissed. As the Complaint herein shows, I am being reduced in grade and compensation and I am being removed

from this office to the machine shop as an experimental machinist. This reduction and removal will reduce my compensation from approximately \$12,000 per year to approximately \$8,000 a year. In the case of the other civil service employees in my office who have received notices of dismissal, upon information and belief, none have obtained any reemployment whatsoever, and unless the Court grants the preliminary injunction in this case, all will be completely off the payroll as of January 13, 1968 and none will have any other employment at that time.

s/

Everette A. Brouillette

Sworn to and subscribed
before me this 10th day of
January, 1968

s/

Notary Public

**Affidavit in Support of Plaintiffs' Motion for
Preliminary Injunction**

CITY OF WASHINGTON }
DISTRICT OF COLUMBIA } ss

George R. Boss, being duly sworn, deposes and says:

1. I submit this affidavit in support of plaintiffs' motion for preliminary injunction in this action.

2. I am presently Director of the Labor-Management Department of the American Federation of Government Employees. Prior to my present employment, I served for 28 years with the Civil Service Commission of the United States, and I am fully familiar with the statutes governing the Commission's functions and with the Commission's regulations and procedures governing reductions-in-force in the various federal agencies, including the National Aeronautics and Space Administration; and

governing civil service employee administrative appeals growing out of such reductions-in-force.

3. Heretofore, and on or about December 6, 1967, 640 civil service employees employed at the Marshall Space Flight Center of the National Aeronautics and Space Administration (NASA) in Huntsville, Alabama received reduction-in-force notices from the Chief of the Center's Personnel Office. A copy of one of these notices, addressed to plaintiff Neil A. Easter in this case, is annexed hereto as *Plaintiffs' Exhibit F*. This notice is typical of the 640 sent by NASA to the said employees, and of course in this case, as in hundreds of others, it proposes to separate plaintiff Easter from his position effective January 13, 1968 after 12 years of satisfactory service to the Government on his part.

4. Said notice, *Exhibit F*, and the others involved state on their faces that the employees may appeal from such removals or demotions "no later than 10 calendar days AFTER removal or demotion". Such appeals in the first instance are to be filed with the Atlanta Region of the Commission in Atlanta, Georgia. These initial appeals, in ordinary course, consume anywhere from 60 days to 4 months for decision. Either the employees involved or NASA can appeal from the initial decision in these cases to the Commission's Board of Appeals and Review in Washington. That Board's consideration of a case can then consume as much as 3 to 6 months or longer, depending on the circumstances involved. The Commission's regulations provide that the Board's decisions are final; but they also provide that the Commissioners themselves, in their discretion, may reopen and reconsider any previous decision. If such reconsideration is ordered, the Administrative procedures in these cases can last for a full year or longer in the regular course of events.

5. When NASA released these RIF notices in early December, 1967, the National President of the American

Federation of Government Employees directed me to go to the Marshall Center in Huntsville to assist Lodge 1858, the bargaining agent for the collective bargaining unit at the Center, and the individual employees involved to prepare administrative appeals to the Commission and to take other effective steps to oppose this RIF, which is clearly unlawful. To date, more than 200 administrative appeals have been filed by civil service employees involved in this RIF, and in accordance with the Civil Service Commission Regulations, most of the others affected by the RIF intend to file administrative appeals within 10 days after the proposed actions become effective or within 10 days after this Court issues a preliminary injunction in this case to enable the Commission to complete the administrative procedures on these appeals mentioned above.

6. While I was at the Marshall Center in early December in connection with these proposed RIF's, I attended a meeting at the Center conducted by Mr. Graydon Pugh, Chief of the Civil Service Commission's Atlanta Region Office which will be in charge of these appeals. The purpose of this meeting was to enable Mr. Pugh to explain, on behalf of the Commission, how it proposed to handle these administrative appeals and to enable Mr. Pugh to answer any questions related thereto. During the course of this meeting Mr. Pugh was formally asked whether, in these appeals, the Commission would decide whether it was lawful for NASA to remove and demote civil service employees in this RIF while it simultaneously retained non-civil service "support contractor" employees with no job retention rights whatsoever to perform the same work as the RIF'd civil service employees or to succeed to the RIF'd employees' work. In response to these questions, I heard Mr. Pugh state in substance the following:

"The problem of contractor personnel retention and the fact that such non-civil service employees might be retained in the same work as RIF'd civil service

employees after January 12, 1968 is *not* within the jurisdiction of the Atlanta Office of the Commission which will handle these appeals. That problem, which involves many legal considerations, will have to be considered by the Commission in Washington, if at all."

Mr. Pugh was then asked if the Atlanta Office of the Commission could take any action to stop or prevent the RIF until these questions could be resolved, and his answer was in the negative.

7. At about the same time, on or about December 4, 1967, the President of Lodge 1858, plaintiff Brouillette in this case, received a letter from the Regional Director of the Atlanta Region of the Commission, Mr. Hammond B. Smith, copy of which is annexed hereto as *Plaintiffs' Exhibit G*. It states that—

"Reduction-in-force considerations are *primarily PROCEDURAL from the Commission's standpoint*. Records reflect whether there was procedural compliance for the most part."

8. Thereafter, on December 4, President Griner of the American Federation of Government Employees sent a telegram to defendant Chairman Macy of the Civil Service Commission urging the Commission to intervene and stop this unlawful RIF at the Marshall Center. On December 12, 1967, Mr. Macy replied, stating in pertinent part:

"Reurtel December 4 Reduction Of Government Workers NASA-MSFC Huntsville while contractor Employees Are Retained, *NASA Is Solely Responsible For Determining Which Civil Service Staffed Activities And Which Contractor Activities Must Be Reduced . . .*"

9. And, previously, on or about November 16, 1967, the General Counsel to the Commission wrote to Senator Lister

Hill of Alabama, copy of which letter is annexed hereto as Plaintiffs Exhibit H. That letter stated:

"We have no information as to whether the contracts under which personnel are furnished at Marshall Space Flight Center contain these elements (of illegality listed in said Counsel's Opinion of October, 1967). However, we were advised by NASA that it plans to rectify all violations, and that it is undertaking a broad study of its support service contracts. Of necessity NASA will need time for an orderly termination of contracts found to be in violation of the personnel laws . . .

" . . . The Commission's jurisdiction with respect to reduction-in-force is limited to issuing regulations and instructions the agencies must follow in making reductions in force, and to acting upon appeals from individual employees adversely affected by reduction-in-force action . . . " (Emphasis supplied).

10. Likewise, in or about November 24, 1967, Chairman Macy of the Commission likewise wrote to the American Federation of Government Employees regarding practices at the Marshall Center of NASA as follows:

" . . . I want to express my appreciation to you for the interest expressed in your letter in avoiding the use of 'contracting out' as a means of evading the personnel laws. I assure you that I am equally concerned in seeing that no evasions of the personnel laws occur. The recent opinion by the Commission's General Counsel regarding (these) contracts . . . should go far both in making clear the position of the Commission and in providing guidance for Government department's and agencies so that personal services are not procured improperly."

11. On or about November 1, 1967, the National Office of the American Federation of Government Employees re-

ceived a copy of a letter written by the Comptroller General of the United States to Chairman Macy of the Commission, copy of which is annexed hereto as *Exhibit I*. That letter states with regard to the October 1967 Opinion of the General Counsel to the Commission:

"I feel certain this document will be of significant value to agencies in determining the propriety of technical support, or similar, service contracts . . . I believe further that the elements required by your General Counsel's Opinion to be used in determining whether a contract, by its terms or in its performance, constitutes the procurement of personal services proscribed by the personnel laws will be most useful to my staff in this area. The application of the general criteria and elements to the . . . contracts and the view expressed in the Opinion that orderly termination and conversion is required is consistent with the position taken by the Commission in 1965 in connection with the contract technicians at the Fuchu Air Force Base, Japan. The General Accounting Office concurred in the action taken at that time and it concurs in the action now indicated . . .

"My view is that the Civil Service Commission and the General Accounting Office have a continuing responsibility to assure that applicable laws are not bypassed. To that end determinations must of necessity be made that will assure such compliance." (Emphasis supplied).

12. During my investigation of the RIF in December 1967, I obtained from the Center copies of two sheets, one entitled "*MSFC Manpower Status Summary—December 1, 1967*"; and the other entitled "*Manpower Status Summary—Single Support Contractor—October 31, 1967*". These sheets, annexed as Plaintiffs' Ex. J-1 and J-2, show the breakdown of employees employed at the Center itself

—civil service and contractor non-civil service alike, working in the same NASA offices and laboratories at the Center. In the *Computation Laboratory*, for example, these sheets show—

176 civil service permanent employees on-board in the laboratory, with

506 Computation Sciences Corp. non-civil service employees.

They also show the side-by-side employment *on-site* in the *Propulsion and Vehicle Engineering Laboratory* of—

778 civil services employees, with

772 Brown Engineering Corp. non-civil service employees.

They likewise show side-by-side employment in the *Management Services Office* of—

178 civil service employees with

671 RCA Service Company employees.

Similar situations exist in almost every other office and facility at the Center.

12. Also annexed hereto as *Exhibit K* is a copy of the "Marshall Star" published at the Center for April 19, 1967, which refers to the Center's annual renewal in April of that year of 9 "support pacts" with 9 companies totaling \$57 million in volume. *This article shows that the Center usually exercises its option to renew or terminate these contracts in March of each year.*

13. During my on-the-spot investigation at the Center in December, 1967, and as a result of meetings with most of the civil service employees involved in the proposed RIF, I learned from facts made available to me that, unless this Court grants a temporary injunction in this case and

ceived a copy of a letter written by the Comptroller General of the United States to Chairman Macy of the Commission, copy of which is annexed hereto as *Exhibit I*. That letter states with regard to the October 1967 Opinion of the General Counsel to the Commission:

"I feel certain this document will be of significant value to agencies in determining the propriety of technical support, or similar, service contracts . . . I believe further that the elements required by your General Counsel's Opinion to be used in determining whether a contract, by its terms or in its performance, constitutes the procurement of personal services proscribed by the personnel laws will be most useful to my staff in this area. The application of the general criteria and elements to the . . . contracts and the view expressed in the Opinion that orderly termination and conversion is required is consistent with the position taken by the Commission in 1965 in connection with the contract technicians at the Fuchu Air Force Base, Japan. The General Accounting Office concurred in the action taken at that time and it concurs in the action now indicated . . .

"My view is that the Civil Service Commission and the General Accounting Office have a continuing responsibility to assure that applicable laws are not bypassed. To that end determinations must of necessity be made that will assure such compliance." (Emphasis supplied).

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671 RCA Service Company employees.

Similar situations exist in almost every other office and facility at the Center.

12. Also annexed hereto as *Exhibit K* is a copy of the "Marshall Star" published at the Center for April 19, 1967, which refers to the Center's annual renewal in April of that year of 9 "support pacts" with 9 companies totaling \$57 million in volume. *This article shows that the Center usually exercises its option to renew or terminate these contracts in March of each year.*

13. During my on-the-spot investigation at the Center in December, 1967, and as a result of meetings with most of the civil service employees involved in the proposed RIF, I learned from facts made available to me that, unless this Court grants a temporary injunction in this case and

prevents the said RIF—employees removed from their positions will, during their appeal periods and while this case is pending a final decision, be forced to follow one of the following alternatives—

(i) remain unemployed

(ii) accept employment at some other Government installation or some private business located as far away as California, Florida, Texas, Louisiana; and in order to accept these interim positions, they will be forced, in some cases, to sell their homes; in others, to break leases on rented dwellings; withdraw children from schools; uproot their entire families; and at their own expense, none of which is reimbursable even if the employees are subsequently reinstated by either the Commission or the Court, travel to these new locations and move their families and all of their belongings and furniture thereto.

(iii) accept employment, if tendered or available, with one of the NASA "support contractors", *with complete loss of all civil service rights, seniority etc*; and in some cases, upon information and belief, these contractors *propose simply to reassign said employees to non-civil service positions at the Center.*

GEORGE R. BOSS

Sworn to and subscribed
before me this 10th day of
January, 1968

.....
Notary Public

EXHIBIT F

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
GEORGE C. MARSHALL SPACE FLIGHT CENTER
HUNTSVILLE, ALABAMA 35812

IN REPLY REFER TO MA-P

December 6, 1967

Mr. Neil A. Easter
R & D, Test Lab.
George C. Marshall Space Flight Center
Marshall Space Flight Center, Alabama 35812

Dear Mr. Easter:

Due to a reduction in funds allocated to the Marshall Space Flight Center, it has become necessary to effect a reduction in personnel assigned to this Center.

The retention rights of all employees concerned have been very carefully checked, and it is found that you have been reached for reduction-in-force action.

The action is:

☒ Separation, effective 01-13-68.

☐ Reassignment to (Title); (Series);
(Grade); (Salary); (Organization)
.....; effective (Month); (Day);
(Year)

☐ Change to lower grade (Title); (Series)
.....; (Grade); (Salary);
(Organization); effective (Month);
(Day); (Year)

☐ Furlough, effective (Month); (Day);
(Year)

The following preference information is furnished to you:

1. Your competitive area is the Marshall Space Flight Center.
2. Your competitive level is W12-001.
3. Your retention subgroup is I-A.
4. Your service computation date is 05-06-55.
5. You officially serve in a position as Experimental Electronic Instrumentation Mechanic. Series 8354. Grade WB 12. Organization B & D, Test Lab.

The offer of reassignment or change to lower grade is in lieu of separation, reduction-in-force. You should indicate your acceptance or declination of this offer by signing in the appropriate space in the attached memorandum and returning to this office no later than three calendar days after receipt of this letter. Your failure to accept within this time limit will be considered as a declination, and you will be separated by reduction-in-force, effective

If you are changed to lower grade in lieu of separation, salary retention is not authorized inasmuch as this reduction-in-force is due to lack of funds. You have the right to appeal the determination to deny salary retention benefits at any time from date of receipt of this notice but no later than 10 calendar days after demotion. Such an appeal may be made to the Atlanta Region, U. S. Civil Service Commission, Atlanta Merchandise Mart, 240 Peachtree Street, NW, Atlanta, Georgia 30303. This appeal must be in writing and should give the basis for appeal.

If you believe that an error has been made and/or you wish to examine the retention register and regulations which have a bearing on your case, you may contact your Personnel Management Specialist in the Personnel Office, second floor of building 4202.

You will continue in a work status in your current position through 01-12-68. If you are separated, you will be paid a lump sum for annual leave up to a maximum of 30 days, or the amount that was creditable to you at the beginning of the current leave year, whichever is greater.

This reduction-in-force is being made in conformance with Civil Service rules and regulations. You may appeal this action to the Atlanta Region, U. S. Civil Service Commission, Atlanta Merchandise Mart, 240 Peachtree Street, N.W., Atlanta, Georgia 30303. This appeal must be in writing and made at any time after receipt of this notice, but not later than 10 calendar days after the effective date of your reassignment, change to lower grade, or separation, as the case may be. Your appeal should set forth your reasons for contesting this action, with offer of proof and such pertinent documents as you are able to submit.

Sincerely yours,

ARTHUR E. SANDERSON
Chief, Personnel Office

MA-14-OT

EXHIBIT G

UNITED STATES CIVIL SERVICE COMMISSION

ATLANTA REGION

COMPRISING ALABAMA, FLORIDA, GEORGIA, MISSISSIPPI,
NORTH CAROLINA, SOUTH CAROLINA, TENNESSEE,
PUERTO RICO, AND THE VIRGIN ISLANDS
OFFICE OF THE DIRECTOR, ATLANTA, GA. 30303

ADDRESS:

Director
Atlanta Region
U. S. Civil Service Commission
Merchandise Mart
240 Peachtree Street, N.W.
Atlanta, Ga. 30303

In Reply Please Refer To
Appl GJP:gbc
Your Reference

December 4, 1967

Mr. Everett Brouillette
President, AFGE Lodge 1858
Building 3648, Room 4
Redstone Arsenal, Alabama 35809

Dear Mr. Brouillette:

This is in response to your Western Union message of November 29, 1967, concerning the ten-day time limit for filing reduction-in-force appeals.

Reduction-in-force considerations are primarily procedural from the Commission's standpoint. *Records reflect whether there was procedural compliance for the most part.* Reduction-in-force records such as the ones showing retention standing on retention registers and the actions in the various competitive levels must be kept open by the agency for inspection by employees who receive reduc-

tion-in-force notices. The records should be opened to the employees to an extent sufficient to settle, as far as possible, all their questions about the reduction-in-force. This covers not only the records relating to the individual employee's competitive level and the competitive level of an employee who may have displaced him but also records for other competitive levels in which employees are retained and over whom affected employees may find they have displacement rights.

When, after a review of the records, an employee feels that his rights have been violated, he may appeal to the Commission by identifying the claimed irregularity. In the case of a delayed appeal, whether an extension of the time limit (beyond that which you mentioned) will be accorded will be based upon the circumstances of the individual case.

Sincerely yours,

HAMMOND B. SMITH
Regional Director

The Merit System—A Good Investment In
Good Government

EXHIBIT H

UNITED STATES CIVIL SERVICE COMMISSION
OFFICE OF THE GENERAL COUNSEL
WASHINGTON, D.C. 20415

In Reply Please Refer To

Your Reference

November 16, 1967

Honorable Lister Hill
United States Senate

Dear Senator Hill:

This refers to your communication enclosing a letter from Mr. Joe B. Smith concerning a proposed reduction of NASA personnel at the George C. Marshall Space Flight Center at Huntsville, Alabama.

Mr. Smith refers to my October 1967 opinion concerning the legality of selected contracts at Goddard Space Flight Center. He then states that "Since there are a large number of contract personnel here at the George C. Marshall Space Flight Center apparently performing the same or similar capacity to civil servants, it appears that there is a violation of the ruling handed down by General Counsel for the Civil Service Commission. In view of this fact it certainly would seem that any reduction in force necessitated by budget restrictions should first be felt in the area of contract personnel."

In the opinion referred to the Commission set forth those elements which we believe result in unauthorized contracts or contract personnel practices which offend the requirements and purposes of the personnel laws relating to Federal employment, as follows:

In the absence of clear legislation expressly authorizing the procurement of personnel to perform the regular functions of agencies without regard to the per-

sonnel laws we must insist on scrupulous adherence to those laws and the policies they embody. Accordingly, contracts which, when realistically viewed, contain all the following elements, each to any substantial degree, either in the terms of the contract, or in its performance, constitute the procurement of personal services proscribed by the personnel laws.

- Performance on-site
- Principal tools and equipment furnished by the Government
- Services are applied directly to integral effort of agencies or an organization subpart in furtherance of assigned function or mission
- Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel
- The need for the type of service provided can reasonably be expected to last beyond one year
- The inherent nature of the service, or the manner in which it is provided reasonably requires directly or indirectly,
- Government direction or supervision of contractor employees in order:
 - To adequately protect the Government's interest or
 - To retain control of the function involved, or
 - To retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.

We have no information as to whether the contracts under which the contractor personnel are furnished at Marshall Space Flight Center contain these elements.

However we were advised by NASA that it plans to rectify all violations, and that it is undertaking a broad study of its support service contracts. Of necessity NASA will need time for an orderly termination of contracts found to be in violation of the personnel laws.

When budget requirements necessitate a reduction of personnel it is the responsibility of the agency concerned, NASA in this case, to determine where the reductions must be made. The Commission's jurisdiction with respect to reduction in force is limited to issuing regulations and instructions the agencies must follow in making reductions in force, and to acting upon appeals from individual employees adversely affected by reduction-in-force action. It may be mentioned, however, that if NASA appropriations for personnel have been reduced it may be necessary to reduce civil service personnel even if contractor personnel are also released.

If I can be of any further assistance do not hesitate to write me.

Sincerely yours,

L. M. PELLERZI
General Counsel

EXHIBIT I

**COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548**

November 1, 1967

D-133394

Dear Mr. Macy:

Reference is made to your letter of October 17, 1967, enclosing a copy of the October 1967 Opinion of the General Counsel of the Civil Service Commission regarding the legality of selected contracts at Goddard Space Flight Center, National Aeronautics and Space Administration.

I feel certain this document will be of significant value to agencies in ascertaining the propriety of technical support, or similar, service contracts. The General Accounting Office has not had nor does it now have any disagreement with the Civil Service Commission as to the standards to be applied in determining whether a contract creates a relationship with the Government tantamount to that of an employer-employee relationship. I believe further that the elements required by your General Counsel's Opinion to be used in determining whether a contract, by its terms, or in its performance, constitutes the procurement of personal services prescribed by the personnel laws will be most useful to my staff in our reviews in this area. The application of the general criteria and elements to the two Goddard Space Flight Center contracts and the view expressed in the Opinion that orderly termination or conversion is required is consistent with the position taken by the Commission in 1965 in connection with the contract technicians at the Fuchu Air Force Base, Japan. The General Accounting Office concurred in the action taken at that time and it concurs in the action now indicated.

I recognize that differences of opinion may sometimes exist as to the relationship created under the terms or

operation of particular support service contracts because of differing conclusions as to the application of the general criteria and elements to specific situations. We think it is clear from the Opinion, however, that no single provision of a contract, such as the task assignment or technical direction requirement, may constitute the basis for a determination that the contract is or is not prescribed by the personnel laws. Rather, the Opinion requires, before an adverse determination, (1) a realistic consideration of the provisions of the entire contract and the overall substance of the operations thereunder, and (2) a conclusion that each of the stated elements is involved therein to a substantial degree.

My view is that the Civil Service Commission and the General Accounting Office have a continuing responsibility to assure that applicable laws are not bypassed. To that end determinations must of necessity be made that will assure such compliance. Accordingly, as such matters come to our attention during our audit activities, we will continue to consult with representatives of the Commission regarding technical support service and similar contracts which do not appear to meet the general criteria and elements set forth in the Opinion.

The General Accounting Office in the exercise of its responsibilities in this area also will continue to undertake to determine whether agencies are operating in an economical and efficient manner in carrying out their functions.

Sincerely yours,

(Signed) ELMER B. STAATS
*Comptroller General of
the United States*

The Honorable John W. Macy, Jr., Chairman
United States Civil Service Commission

877-2080		NSFC MANPOWER STATUS SUMMARY															Dec 1, 1963						
ORGANIZATION	VOUCHERED COLIC (P-40)	ON CIVIL SERVICE PERSONNEL															ON RES	TIME CLERICAL ETC.	OUTSIDE AREA				
		PERMANENT					NON-PERMANENT																
		TOTAL	CASPL	WB	CO-OPS	SEC	SENIOR	STAFF	TEMP	CAS	STAFF	STAFF	STAFF	STAFF									
Director & Deputies	23	23	23														23						
Special Staff	67	66	66			1											67						
Chief Counsel	19	18	18			2	2										20						
Public Relations Office	4	5	5														0	4	1				
Public Contact	9	9	9			1						1					10						
Public Affairs Office	29	28	28			2	1	1									30						
Production & Design Office	81	78	78			3	2					1				1	79		2				
Contract Management Office	175	172	172			6	4	2									175						
Management Services Office	195	189	184	25		2	1					1					178	11	2				
Computer Utilization & Admin.	125	113	113			16	4	10				1	1			1	129						
Purchasing Office	225	215	215			8	5	3									85	140					
Technical Services Office	343	334	295	239		6	1	5									550						
SUB-TOTAL	1495	1450	1186	264	47	20	21	0	1	5	0	0	0	0	0	0	1337	195	5				
Director, R&D Ops	10	6	6														6						
Operations Office	34	33	33														34						
Operations Management Office	60	61	61			1		1									62						
Systems Eng. Office	37	32	32			1		1									35						
Advanced Systems Office	90	104	104			4	2	2									103						
Acro-Astronautics Lab	335	332	326	6	32	29	2					1				3	364						
Astronautics Lab	880	878	779	99	25	21	3					1					892	2	6				
Computation Lab	169	176	176			14	11	2				1					190						
Manufacturing Eng. Lab	700	715	606	309	7	6	1						2				709		13				
Propulsion & Vehicle Eng. Lab	741	740	708	32	38	30	4					2	3	2	2	2	778						
Policy & Rel Assurance Lab	561	550	540	10	12	9	1					2			1		482	15	65				
Life Sciences Lab	116	119	119			16	14	1				1				1	131		4				
Test Lab	623	630	381	249	19	17	2								2		645						
SUB-TOTAL	4353	4326	3531	795	169	139	201	0	0	0	8	2	6	6	6	6	4500	17	88				
Director, Industrial Operations	13	14	14														11		3				
Contracts Office	128	127	127			2		2									114		15				
Facilities Projects Office	2	5	5														3						
Project Logistics Office	20	19	19			1		1									15		3				
Resources Management Office	44	42	42			2		1				1					44						
Engine Program Office	95	97	97			4	1	2				1					72		28				
Engine Apollo Appl. Office	95	88	83			1						1					81		3				
Engine LAR Program Office	146	144	144			5	1	3				1					153		8				
Engine V Program Office	319	329	329			2		1				1				3	328		101				
Vehicle Assembly Facility	230	231	231			1		1									0		232				
Operations Office	45	42	42														37		5				
Missile Test Facility	96	96	96			3	3										0		99				
SUB-TOTAL	1218	1233	1220	0	21	5	11	0	0	0	5	0	0	0	0	0	15	215	0	539			
TOTALS	7035	7059	6090	969	237	164	52	0	11	18	2	6	23	6	23	6	4492	172	632				
SUMMARY	PERMANENT															NON-PERMANENT					TOTAL CIVIL SERVICE		
			CASPL	WB	CO-OPS	SEC	SENIOR	STAFF	TEMP	CAS						TOTAL							
	CEILING FLM		7086		169	105	0	0	0	0	7360					CASPL 11							
	BY BOARD		6090	969												CO-OPS 147							
	TOTAL		7099		164	57	0	1	18	2	7296					CASPL 7							
	DIFFERENCES		-27		-5	-53	0	+1	-28	+2	-64												
	UNAPPORTIONED		6		0	0	0	0	0	0	6					TOTAL 363							
	DIFFERENCE		-21		-5	-53	0	+1	-28	+2	-58												
	S-12, 13, 15		STAFF	8808	40	CENTER	ENG. CAL. SERV.	STAFF	8808	40													
	ACTUAL		124	776	323	1226					PLANNING 3					TOTAL 12							
	ACTUAL		124	766	326	1216					ACTUAL 343												
	DIFFERENCE		0	-8	-3	-10					DIFFERENCE 1												

EXHIBIT J-1

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S77-2080		MANPOWER STATUS SUMMARY SINGLE SUPPORT CONTRACTOR (UNCLASSIFIED - SUPPORT CONTRACTORS)				Date: October 31, 1967		
LABORATORY/OFFICE	CONTRACTOR	ENGINEERING SUPPORT CONTRACTOR		TOTAL	LOCATION OF PERSONNEL			
		A	B		CRCA	HUNTSVILLE OFF POST	OUTSIDE HUNTSVILLE	LOCAL CONTRACTOR
Facilities & Design Office	Russ Eng.		33	33		33		
Aero-Astrodynamics Laboratory	Northrop		276	276	38			218
Astrodynamics Laboratory	Sperry		834	834	332		FFF	201
Computation Laboratory	CSC		531	531	506			25
Manufacturing Engineering Lab.	Hayes		238	238	159		29	
Propulsion & Vehicle Eng. Lab.	Brown		1006	1006	772			234
Space Sciences Lab.	Brown		80	80	45			35
Test Laboratory	Vibro		476	476	441			35
Quality & Reliability Asses. Lab.	Spaco		373	373	288			85
	PEC		126	126			27	99
	TOTALS		3973	3973	3098	35	277	972
HOUSEKEEPING SUPPORT								
OFFICE/FACILITY	CONTRACTOR			TOTAL				
Management Services Office	RCA Service Company			776	671	66	2	37
Technical Services Office	Myers Serv. Inc. of Ind.			498	476			22
	TOTAL			1274	1147	66	2	59
MANAGEMENT OPERATIONS SUPPORT								
Missouri Assembly Facility	Mason-Rust			765				765
	LTV			283				283
Mississippi Test Facility	General Electric Co.			1778				1778
	TOTAL			2831				2831
	TOTALS			4105	1147	66		2833
	GRAND TOTAL			8078	3973	99	1050	951
REMARKS:								
9-2								

EXHIBIT J-2

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EXHIBIT K

[Marshall Star, April 19, 1967]

MSFC EXTENDS 9 SUPPORT PACTS; TOTAL \$57 MILLION

Nine firms have been awarded contract extensions totaling more than \$57 million for providing engineering, fabrication, and institutional support services to six laboratories and three offices at the Marshall Center.

The Marshall Center chose to exercise its options in March to continue the support contracts awarded in 1965. These awards are the second one-year renewals exercised under the original contracts.

Support contractors, the cost of the one-year effort and the laboratory or office supported are:

Sperry Rand Corp., Space Support Division, Huntsville, \$12,695,727, Astrionics Lab.

Vitro Services Division, Vitro Corp., Ft. Walton Beach, Fla., \$5,344,159, Test Lab.

Brown Engineering Co., Huntsville, \$12,350,140, Propulsion and Vehicle Engineering Lab.

Spaco, Inc., Huntsville, \$5,971,638, Quality and Reliability Assurance Lab.

Northrop Corp., Northrop Space Laboratories, Huntsville, \$3,905,000, Aero-Astroynamics Lab.

Hayes International Corp., Birmingham, \$4,969,277, Manufacturing Engineering Lab.

Management Services Inc., Oak Ridge, Tenn., \$5,560,941, Technical Services Office.

Rust Engineering Co., Birmingham, \$599,090, Facilities and Design Office.

RCA Service Co., Camden, N. J., \$5,749,907, Management Services Office.

The awards are cost plus incentive-award fee contracts. The original six laboratory engineering support contracts and one office support contract had provisions for four additional one-year renewals. Two contracts for institutional support services had provisions for two consecutive one-year extensions.

The work is primarily in support of the Saturn launch vehicle program. Most of the work under the contracts will be performed on the premises of the Marshall Center, but some will be done in contractor facilities at Huntsville and other locations.

During 1967 the National Aeronautics and Space Administration will flight test for the first time the Saturn V rocket which will transport Americans to the moon. It can place 280,000 pounds into earth orbit, the equivalent of 40 Gemini spacecraft.

Defendants' Opposition to Motion for Preliminary Injunction

Defendants by their attorney, the United States Attorney for the District of Columbia, hereby oppose plaintiffs' motion for preliminary injunction, and suggest that the Court *sua sponte* dismiss this action for patent want of jurisdiction, on the following grounds:

- 1. *Failure to exhaust administrative remedies.***

This suit is premature; the individual plaintiffs (and the class they purport to represent) have not exhausted their available administrative remedies before the Civil Service Commission; and they cannot bring their case within any exception to the operation of the exhaustion doctrine.

- 2. *Equity jurisdiction is totally lacking.***

The individual plaintiffs (and the class they purport to represent) have a plain and adequate remedy at law, *i.e.*, an appeal to the Civil Service Commission in each

individual case; and they cannot show any irreparable injury cognizable in equity.

3. *Sovereign immunity.*

This suit is an unconsented suit against the United States: it seeks to enjoin the United States, to compel it to continue paying to the individual plaintiffs (and the class they purport to represent) salaries, and to continue being liable to them for all other benefits and emoluments, incident to Federal employment, out of the public treasury—regardless of the ultimate outcome of this litigation.

4. *Lack of standing to sue (insofar as plaintiff AFGE Lodge 1858 is concerned).*

Plaintiff AFGE Lodge 1858 has no litigable interest of its own in this lawsuit; and it is not a "real party in interest" as to the individual claims of its members asserted herein.

Defendants further oppose plaintiffs' motion for preliminary injunction on the additional ground that the large public interest to be served by the reduction-in-force action going into effect as scheduled on January 13, 1968, clearly warrants the Court in any event withholding all equity intervention at this time in this reduction-in-force matter.

Incorporated into and made a part of this motion are the following exhibits, identified as indicated:

Government
Exhibit No.

Description

1. Affidavit dated January 8, 1968 by Harold B. Finger, Associate Administrator for Organization and Management, National Aeronautics and Space Administration.
2. Affidavit dated January 5, 1968 by John W. Macy, Jr., Chairman, United States Civil Service Commission.

In support hereof, defendants submit the annexed memorandum of points and authorities (incorporated herein by reference).

/s/ DAVID G. BRESS
United States Attorney

/s/ JOSEPH M. HANNON
Assistant United States Attorney

/s/ GIL ZIMMERMAN
Assistant United States Attorney

Government Exhibit No. 1

AFFIDAVIT

Harold B. Finger, being duly sworn, deposes and says:

1. I am the Associate Administrator for Organization and Management, National Aeronautics and Space Administration ("NASA"). Under the NASA Administrator, I am the senior NASA official having overall responsibility with respect to NASA personnel administration, procurement, and financial management. As to the matters set forth in the following paragraphs, they are true and correct to the best of my knowledge, information and belief.

2. NASA was created by the National Aeronautics and Space Act of 1958 to carry out the nation's civilian space program. One of the specifically declared Congressional objectives was to most effectively utilize the scientific, and engineering resources of the United States." The Act further provides authority for the Administrator "to enter into and perform such contracts, leases, cooperative agreements or other transactions as may be necessary in the conduct of its work and on such terms as it may deem appropriate, . . ." (42 U.S.C. 2451(c)(8); 2473(b)(5)). Following the establishment of NASA, programs being performed by Civil Service employees and by contractors

were transferred to NASA pursuant to the Act and various implementing Executive Orders. In NASA's view, the performance of the space program by means of both contractors and Civil Service activities is in accord with its statutory authority. The NASA authorization and appropriation acts have recognized this cooperative endeavor to accomplish NASA's space mission.

3. In general, NASA has followed a policy of having its Civil Service personnel provide the management, planning and controls necessary to assure that the various NASA programs are properly being carried out. The capability of industry has been heavily relied upon to develop and manufacture "the hardware" needed to perform the NASA mission and to provide support services for NASA operations. In NASA's view, the cooperative utilization of the scientific and engineering resources of the United States have added strength to industry, universities, and NASA itself as well as the other interested Government agencies and has avoided unnecessary duplication of facilities and equipment, which are among the declared objectives of the Act.

4. The George C. Marshall Space Flight Center, located at the Army's Redstone Arsenal, Huntsville, Alabama, originally was the Development Operations Division of the Army Ballistic Missile Agency. This activity was transferred to NASA in 1960. In July 1960, the Army transferred approximately 4,600 civil service employees working in the Development Operations Division at Huntsville to NASA. At the same time, the Army transferred to NASA support contracts under which approximately 1,019 non-Government (contractor) personnel were employed at Huntsville. These transfers represented the continuation by NASA of the existing support contract approach developed by the Army.

5. After NASA assumed control over the Huntsville facility, now the George C. Marshall Space Flight Center,

its responsibilities increased. During the period 1960-1964, the permanent civil service force at the Center increased from the 4,600 transferred to NASA in 1960, to 5,521 in Fiscal Year 1961, to 6,669 in 1962, to 6,821 in 1963 and to 7,321 in 1964. During the same period, the contractor support force at the Center increased from the 1,019 non-Government (contractor) personnel, who were performing functions for the Army at the time of the transfer of the facility to NASA, to an estimated 2,440 in 1961, to an estimated 3,588 in 1962, to an estimated 5,814 in 1963, and to an estimated 6,421 in 1964.

6. In 1965, the work responsibilities of the Marshall Space Flight Center began to level off as a result of programs assigned to Marshall nearing completion. Since 1966, the work there has been declining. Both the Civil Service complement and the contractor support staffing have shown a steady decline. The civil service work force decreased to 7,266 in Fiscal Year 1966, to 7,179 in Fiscal Year 1967, to a projected 6,386 at the close of business on January 12, 1968. Contractor support at Huntsville also declined from an estimated 6,044 in Fiscal Year 1965, to an estimated 5,813 in Fiscal Year 1966, to an estimated 5,633 in Fiscal Year 1967, to an estimated 4,595 by close of business on January 12, 1968. Before the end of this Fiscal Year (June 30, 1968) support service contractor employees working at Huntsville will be reduced approximately 1,000. These reductions are in addition to the 400 support service contractor personnel that have been reduced by Marshall during the past 7 months.

7. The appropriation authorized by Congress for NASA is in three separate parts: Research and Development ("R&D"), Construction of Facilities ("C of F"), and Administrative Operations ("AO"). The AO appropriation covers the payment of overtime, travel, civil service personnel salaries, as well as other expenses associated with the day-to-day operations of NASA. The R&D ap-

appropriation is used to carry out the NASA Research and Development programs including the purchase of research equipment, research grants to Universities and research and development contracts with Industry and contracts for services in support of Research and Development programs.

8. Congress reduced the NASA 1968 budget \$511.1 million from the budget request submitted by the President. This budget reduction was specified by Congress as to the three separate parts of the appropriation, in such a way that it is necessary for NASA to operate in the current fiscal year with appropriations (1) for Research and Development programs other than Apollo approximately 20% below the budget request, (2) for Construction of Facilities which are less than 50% of the budget request, (3) for Administrative Operations which are \$43 million below the budget request.

9. In addition to these budget reductions directed by Congress, the President has given clear instructions that expenditures are to be reduced in the current fiscal year to the lowest possible level, and continued at the lowest possible level in the next ensuing Fiscal Year 1969.

10. This made it necessary for NASA to adjust its operations to a lower level than had been planned when the Fiscal Year 1968 budget request was submitted to Congress and to make sufficient reductions to assure that operating levels would not exceed Fiscal Year 1969 budget plans. The budget request had included funding for the Apollo and other on-going programs as well as requesting authority and funds to begin a limited number of programs for the next decade. Funds for some of the programs were specifically eliminated or reduced by Congress.

11. With respect to the AO appropriation, such areas as supplies, equipment, utilities, support contracts funded under AO, travel and other institutional costs have been reduced as much as possible. However, 63% of the funds in

this AO appropriation are for civil service personnel compensation.

12. As a result of the reductions in the three separate parts of the appropriation, a decrease in NASA's civil service personnel ceiling by approximately 1,700 from 34,126 to 32,422 was dictated.

13. Among those R&D programs specifically eliminated or reduced by the Congress are the following which reduced the work load and mission of the Marshall Space Flight Center: NERVA II (Nuclear Engine for Rocket Vehicle Applications), Voyager Planetary Missions, and the Apollo Applications Program. Considering the reduction in appropriations and the program work load of Marshall Space Flight Center, it was decided that at Marshall a 700-man reduction in civil service staffing, to a level of 6,386 positions, was required. As previously stated, in addition to this reduction in civil service personnel, further reductions were planned in contractor support efforts.

14. The 700 civil service position reduction at Marshall resulted in a reduction in force of 569 civil service employees with the balance of the reduction resulting from voluntary resignations and retirement. In addition to the 560 employees who will be separated, standard civil service reduction in force procedures have resulted in 300 employees being reduced in grade and 260 other employees receiving reassignment offers. The total number of individual employees who have been affected by the reduction in force procedure is therefore 1,120.

15. As a matter of personnel policy, NASA determined, and has endeavored, to take all possible steps to avoid instances wherein civil service employees are separated in the current reduction in force while non-Government (contractor) personnel performing the same function continue to work under support contracts. Marshall management has determined that the 560 civil service personnel who have been given separation notices at the Marshall Space

Flight Center are not needed to carry out the present curtailed programs of that Center. In addition, they have determined that support service contractor employees are not performing the same function as the civil service personnel to be separated. While, in some instances, the duties being performed by the contractor personnel may be similar to those performed by civil service personnel in other Center activities, it is not practical or feasible to insert civil service personnel in the midst of a contractor operation as these contractors have a clearly defined responsibility to perform under the terms of their contracts.

16. At present, NASA is aware of no instances at Marshall Space Flight Center where civil service employees are working side-by-side with contractor personnel performing the same duties. However, if the facts developed on the Civil Service appeals of the individuals concerned, or our own continuing evaluation, show any instances where a civil service employee being separated is working side-by-side with, and performing the same duties as a contractor employee, appropriate corrective action will be taken. Further, in any instance in which the Civil Service Commission sustains the appeal, we will of course reinstate the separated employee with back pay in accordance with law.

17. In addition, and in the interest of the personnel concerned, the Marshall Space Flight Center, in cooperation with the Civil Service Commission, has established a positive out-placement program, the primary purpose of which is to place the separated employees elsewhere within the NASA organization. When placement elsewhere within NASA is not feasible, we are endeavoring to place these employees with other Government agencies and Industry.

18. In the event that NASA were required to continue the 560 employees at the Marshall Space Flight Center subject to the reduction in force notices effective January 13, 1968, beyond that date, NASA will be obliged to pay

salaries, personnel benefits, and other related expenses at an annual rate of approximately \$5 million. Because of the decrease in appropriations and work load of the Marshall Space Flight Center, even if the support service contracts complained of in this suit were discontinued, it would still be necessary to have a reduction in force on January 13, 1968.

19. The reduction in force action at the Marshall Space Flight Center is a reflection of appropriation reductions and program deletions, reductions, and completions. The actions taken at Marshall and elsewhere represent NASA's best judgment in continuing those operations that are most urgently required to go forward, consistent with the Congressional intent, the best interest of the nation's space program and the maintenance of the technological, industrial and Government base for future space efforts.

HAROLD B. FINGER

Sworn to and subscribed in my presence this 8th day of January 1968.

MARGARET F. NELSON

Notary Public in and for the
District of Columbia

My Commission Expires February 14, 1972

(SEAL)

**Defendants' Supplement to Opposition to Motion for
Preliminary Injunction**

Defendants by their attorney, the United States Attorney for the District of Columbia, as a supplement to their Opposition to the Motion for Preliminary Injunction, hereby incorporate into and make a part of said Opposition as Government Exhibit No. 3 the affidavit dated January 9, 1968, by James C. Spry, Executive Assistant, Civil Service Commission, together with the attached copies of the initial letters of appeal to the Commission, filed by individual plaintiffs in this action relative to the reduction-in-force action being taken in their individual cases.

/s/ DAVID G. BRESS
United States Attorney

/s/ JOSEPH M. HANNON
Assistant United States Attorney

/s/ GIL ZIMMERMAN
Assistant United States Attorney

Supplemental Affidavit

I, JAMES C. SPRY, Executive Assistant to the Commissioners, United States Civil Service Commission, and official custodian of all Commission records and documents, being duly sworn hereby state as follows:

That the documents attached hereto consisting of

1. Letter of December 7, 1967, from Edward B. Campbell, Athens, Alabama to Hammond B. Smith.
2. Letter of December 8, 1967, from Neil A. Easter, Huntsville, Alabama to Hammond B. Smith.
3. Letter of December 11, 1967, from William S. Ellett of Flintville, Tennessee to Hammond B. Smith.
4. Letter of December 11, 1967, from Elmer A. Gunter of Huntsville, Alabama to United States Civil Service Commission, Atlanta, Georgia and

5. Letter of December 13, 1967, from Doris E. Roden of Arab, Alabama to Hammond B. Smith

are true copies of the initial letters of appeal filed with the Civil Service Commission by the authors of the listed letters.

/s/ JAMES C. SPBY
Executive Assistant to the
Commissioners
United States Civil Service
Commission

Subscribed and sworn to before me at Washington, D.C.
this 9th day of January 1968.

/s/ VIOLET Z. DEE
Notary Public

My commission expires February 29, 1972

December 7, 1967

Mr. Hammond B. Smith
Director, Atlanta Region
U.S. Civil Service Commission
240 Peachtree Street, N. W.
Atlanta, Georgia 30303

Dear Mr. Smith:

I desire to appeal the reduction-in-force (Enclosure I) in my instance, from the George C. Marshall Space Flight Center on the following basis:

(A) That the decision of the agency to effect a reduction-in-force is in violation of specific Civil Service Commission guides to wit: The opinion of the General Council, Mr. L. M. Pellerzi, dated October 1967 which in part states, "In the absence of clear legislation expressly authorizing

the procurement of personnel to perform the regular functions of agencies without regard to the personnel laws, we must insist on scrupulous adherence to those laws and the policies they embody." That the George C. Marshall Space Flight Center is not abolishing positions but merely removing civil service personnel and having the duties performed by a contractor.

(B) That the George C. Marshall Space Flight Center has by illegally utilizing support and prime contractors reduced the positions and competitive levels so as to deny consideration of civil service employees authorized and promulgated under FPM 351. Further that specific work was removed from the appellant and given to a contractor to perform, while the appellant was not offered any position within all of the George C. Marshall Space Flight Center.

(C) That the established competitive level is arbitrary and capricious in that all employees with the same job title, series classification, skills, and knowledge requirements were not included in the R.L.F. register.

Although the above covers reasons for my appeal, I believe that I should be able to cover any facet which has an impact on my rights and preference retention under applicable laws and regulations.

I designate AFGE Lodge 1858 as my representative and request a hearing.

Sincerely,

EDWARD B. CAMPBELL
1302 Astor R. 10
Athens, Ala. 35611

Copy Furnished:
AFGE Lodge 1858

vls

1 Enclosure

December 8, 1967

Mr. Hammond B. Smith
Director, Atlanta Region
U.S. Civil Service Commission
240 Peachtree Street, N. W.
Atlanta, Georgia 30303

Dear Mr. Smith:

Under the provisions of FPM 752b and the Veterans Preference Act of 1944 as amended, I desire to appeal the reduction-in-force (Enclosure I) in my instance, from the George C. Marshall Space Flight Center on the following basis:

(A) That the decision of the agency to effect a reduction-in-force is in violation of specific Service Commission guides to wit: The opinion of the General Council, Mr. L. M. Pellerzi, dated October 1967 which in part states, "In the absence of clear legislation expressly authorizing the procurement of personnel to perform the regular functions of agencies without regard to the personnel laws, we must insist on scrupulous adherence to those laws and the policies they embody." That the George C. Marshall Space Flight Center is not abolishing positions but merely removing civil service personnel and having the duties performed by a contractor.

(B) That the George C. Marshall Space Flight Center has by illegally utilizing support and prime contractors reduced the positions and competitive levels so as to deny consideration of civil service employees authorized and promulgated under FPM 351. Further that specific work was removed from the appellant and given to a contractor to perform, while the appellant was not offered any position within all of the George C. Marshall Space Flight Center.

(C) That the established competitive level is arbitrary and capricious in that all employees with the same job

title, series classification, skills, and knowledge requirements were not included in the R.I.F. register.

(D) That the RIF removed all but six workers within the Control Branch of the Electrical and Instrumentation Section of the Test Laboratory, leaving eight (8) supervisors. That it is logical, since the supervision remains, that either contractor help or supervisors will perform my duties. In either case, the job has not been abolished, just that I have been removed.

(E) That I was denied lateral rights to positions in the M. E. Laboratory occupied by persons with less tenure. That the only difference is the job titles where one is called an Instrumentation Mechanic and the other is an Installer. Both are Experimental Electronic and only a recent classification changed the titles although the duties are interchangeable.

Although the above covers reasons for my appeal, I believe that I should be able to cover any facet which has an impact on my rights and preference retention under applicable laws and regulations.

I designate AFGE Lodge 1858 as my representative and request a hearing under the provisions of the Veterans Preference Act of 1944, as amended.

Sincerely,

NEIL A. EASTER
6114 Stratford Ct.
Huntsville, Alabama,

Copy Furnished:
AFGE Lodge 1858

vls

1 Enclosure

December 11, 1967

Mr. Hammond B. Smith
Director, Atlanta Region
U.S. Civil Service Commission
240 Peachtree Street, N. W.
Atlanta, Georgia 30303

Dear Mr. Smith:

I desire to appeal the reduction-in-force (Enclosure I) in my instance, from the George C. Marshall Space Flight Center on the following basis:

(A) That the decision of the agency to effect a reduction-in-force is in violation of specific Civil Service Commission guides to wit: The opinion of the General Council, Mr. L. M. Pellerzi, dated October 1967 which in part states, "In the absence of clear legislation expressly authorizing the procurement of personnel to perform the regular functions of agencies without regard to the personnel laws, we must insist on scrupulous adherence to those laws and the policies they embody." That the George C. Marshall Space Flight Center is not abolishing positions but merely removing civil service personnel and having the duties performed by a contractor.

(B) That the George C. Marshall Space Flight Center has by illegally utilizing support and prime contractors reduced the positions and competitive levels so as to deny consideration of civil service employees authorized and promulgated under FPM 351. Further that specific work was removed from the appellant and given to a contractor to perform, while the appellant was not offered any position within all of the George C. Marshall Space Flight Center.

(C) That the established competitive level is arbitrary and capricious in that all employees with the same job title, series classification, skills, and knowledge requirements were not included in the R.L.F. register.

I hereby appeal and request a hearing as outlined under the Veterans Preference Act.

Although the above covers reasons for my appeal, I believe that I should be able to cover any facet which has an impact on my rights and preference retention under applicable laws and regulations.

I designate AFGE Lodge 1858 as my representative and request a hearing.

Sincerely,

WILLIAM S. ELLETT
Route 2
Flintville, Tennessee 37335

Copy Furnished:
AFGE Lodge 1858

vls
1 Enclosure

6308 Madison Pike
Huntsville, Alabama 35806
December 11, 1967

U. S. Civil Service Commission
Atlanta Merchandise Mart
240 Peachtree Street, NW
Atlanta, Georgia 30303

ATTN: Appeals Division

SUBJECT: Appeal of Personnel Action

In accordance with the Federal Civilian Personnel Regulations and the instructions contained in my letter of separation dated December 6, 1967, from Mr. Arthur E. Sanderson, Chief of Personnel Office for Marshall Space

Flight Center, the basis for this appeal is established on the following:

A. The Notice of Separation did not indicate that any effort was made to consider my retention as an employee in a lower grade.

B. No evidence was submitted, or implied that I had been considered in any area for continued employment under the authorized retreatment program.

C. No evidence was supplied, submitted, or implied that consideration had been given to my continued employment in another position for which I was qualified by the Interagency Board of U. S. Civil Service Examiners, and for which an Announcement had been made for recruitment to fill the vacancy by lateral transfer, demotion or promotion (Reference John F. Kennedy Space Center Announcement Number 310-67 and open Competitive Announcement Number 347-B by the Interagency Board of U. S. Civil Service Examiners). A copy of my record of eligibility was forwarded to MSFC personnel office for inclusion in my 201 file, prior to issuance of the impending Notice of Separation.

D. No indications, written or otherwise were made to me that considerations had been given to my eligibility under the following certified eligible positions:

1. Aero—Space Technologist—Research and Development Administration Announcement Number 347-B; eligibility rating of 85 for GS-13 position.

2. Production Specialist with an eligibility rating of 78 for GS-13 position.

3. Procurement Analyst with an eligibility rating of 82 for a GS-12 position.

4. Maintenance Technician (vehicle & powered Ground Equipment) with an eligibility rating of 80 for a GS-11 position.

5. Quality Control Specialist with a GS-13 eligibility rating as one of the five best qualified.

6. Supervisory Production Specialist with a GS-13 rating as one of the five best qualified.

7. Electronic Equipment Inspection Specialist with a GS-13 rating as one of the five best qualified.

E. The notice of separation failed to recite whether as a result of the action I would be entitled to severance pay or forced to accept retirement at reduced annuity.

F. The notice of separation has deprived me of my right for continued employment through no act or condition on my part with the Federal Government.

G. The notice of separation if reduced to a condition of forced retirement removes my Federal and constitutional guarantee of continued employment for the ensuing 17 years (provided conditions caused by me would not result in my separation for other reasons until age 72).

H. Separation without cause as a result of a decrease in funds to be authorized by the Congress, while continuing to employ personnel in the employ of a contractor whose contract was approved solely to furnish personnel to do the same or comparable jobs is an act of discrimination and an unfair labor practice within the statutes of the Federal regulations.

I. Utilization of contractor personnel to perform duties identical to or comparable to the duties performed by me without requiring said contractor personnel to meet the standards for employment established by the several announcements of the Civil Service Examination is an act of discrimination, unfair labor practice, and a complete disregard of Federal laws and regulations.

J. Failure on the part of the personnel office to publish in advance—the total number of personnel in my competi-

tive level, the number of actual positions filled, and the total number of positions to be abolished as a result of the reduction in force action.

K. Failure on the part of the personnel office in its letter of separation that a counseling service was available to provide for discussion and such personnel action as might be required to implement the provisions of a forced retirement status for separated employees considered in this category.

Documents supporting my claim of eligibility have been included as evidence. Additionally, documents supporting my claim for consideration for a position declared vacant before and during the time of my reduction in force notice have also been included.

Your review of this appeal and a subsequent reply will be appreciated.

Very truly yours,

ELMER A. GUNTER

Enc:

- 1—Separation Notice
- 2—KSC Announcement 310-67
- 3—CSC Form 4008 (11/15/67)
- 4—Letter to KSC (11/28/67)
- 5—Letter to KSC (12/11/67)
- 6—CSC Form 4008 (3/19/59)
- 7—CSC Form 4008 (8/3/60)
- 8—CSC Form 4008 (6/29/55)
- 9—MSFC Form 488 (4/13/61)
- 10—MSFC Form 488 (5/10/61)
- 11—MSFC Form 488 (10/20/61)

December 13, 1967

Mr. Hammond B. Smith
Director, Atlanta Region
U.S. Civil Service Commission
240 Peachtree Street, N. W.
Atlanta, Georgia 30303

Dear Mr. Smith:

I desire to appeal the reduction-in-force (Enclosure I) in my instance, from the George C. Marshall Space Flight Center on the following basis:

(A) That the decision of the agency to effect a reduction-in-force is in violation of specific Civil Service Commission guides to wit: The opinion of the General Council, Mr. L. M. Pellerzi, dated October 1967 which in part states, "In the absence of clear legislation expressly authorizing the procurement of personnel to perform the regular functions of agencies without regard to the personnel laws, we must insist on scrupulous adherence to those laws and the policies they embody." That the George C. Marshall Space Flight Center is not abolishing positions but merely removing civil service personnel and having the duties performed by a contractor.

(B) That the George C. Marshall Space Flight Center has by illegally utilizing support and prime contractors reduced the positions and competitive levels so as to deny consideration of civil service employees authorized and promulgated under FPM 351. Further that specific work was removed from the appellant and given to a contractor to perform, while the appellant was not offered any position within all of the George C. Marshall Space Flight Center, that I consider reasonable.

(C) That the established competitive level is arbitrary and capricious in that all employees with the same job title, series classification, skills, and knowledge requirements were not included in the R.I.F. register.

(D) That the entire Civil Service personnel except two within my level were removed, yet positions, and duties remain in R&D Comp. Lab., which will be assumed by the contractor already there.

Although the above covers reasons for my appeal, I believe that I should be able to cover any facet which has an impact on my rights and preference retention under applicable laws and regulations.

I designate AFGE Lodge 1858 as my representative and request a hearing.

Sincerely,

DORIS E. RODEN
P. O. Box 415
Arab, Ala. 35016

Copy Furnished:
AFGE Lodge 1858
vls
1 Enclosure

Government Exhibit No. 2

AFFIDAVIT

I, JOHN W. MACY, JR., Chairman, United States Civil Service Commission, being duly sworn, states as follows:

1. That from information available to the Commission, about 560 employees of the George C. Marshall Space Flight Center will be separated and an additional 300 employees will be demoted in a reduction in force scheduled to be effective January 12, 1968.
2. That each of these employees has a right to appeal to the Commission from the reduction-in-force action at any time after receipt of notice of the specific action proposed but not later than 10 days after the effective date of the action. (5 CFR 351.901)

3. That as of close of business January 4, 1968, 245 employees of the George C. Marshall Space Flight Center, Huntsville, Alabama, including all the individual plaintiffs in this case, except Everett A. Brouillette, had filed appeals with the Commission contesting the action proposed to be taken against them in the reduction in force.
4. That to facilitate handling the large number of appeals received, the appeals from the employees of the Marshall Space Flight Center have been divided into three main categories by types of employees, namely: (1) professional, (2) clerical, administrative, technical, and (3) wage board; that these main categories have been subdivided by the nature of the allegations into (1) appeals relating to the competitive level, (2) appeals alleging denial of bumping rights, (3) appeals involving combination of (1) and (2), and (4) all other appeals.
5. That the vast majority of the appeals received raise the same question as to the legality of the reductions in force in the light of the contracting practices of National Aeronautics and Space Administration that is raised in the complaint in this case.
6. That the Commission is presently reviewing the appeals that have been filed and attempting to obtain the factual information necessary to adjudicate the appeals.
7. That the Commission has not adjudicated any appeals at this time nor does it seem likely that it will be possible to adjudicate any appeal before the effective date of the reduction in force, January 12, 1968. When the necessary factual information has been obtained and a hearing has been held, if requested by the appellant, each appeal will be adjudicated and all pertinent points raised by the appellant will be decided.

8. That when a review of an appeal results in a conclusion that the reduction-in-force action was improper for any reason, the Commission instructs the agency to take corrective action.
9. That the corrective action that the Commission is authorized to recommend includes restoration to duty in the case of separation from the service and restoration to the employee's former grade in the case of demotion.
10. That the agency is required to take the corrective action that the Commission finally recommends (5 CFR 5.3(d); 351.902) and to pay the employee the pay, allowances, and differentials that he would have received if the improper action had not been taken and to credit the period as service for all purposes including leave, retirement, and insurance (5 U.S.C. 5596).

/s/ JOHN W. MACY, JR.
Chairman
United States Civil Service
Commission

Subscribed and sworn to before me this 5th day of January
1968.

/s/ VIOLET Z. DEE
Notary Public

My Commission expires February 29, 1972

**Motion of National Council of Technical Service Industries
for Leave to Intervene as a Defendant**

The National Council of Technical Service Industries (herein "NCTSI"), by its counsel, hereby moves, pursuant to Rule 24(a) or, in the alternative Rule 24(b), of the Federal Rules of Civil Procedure, 28 U.S.C., for leave to intervene as a defendant herein.

The grounds for the Motion to Intervene as a matter of right under Rule 24(a) are as follows:

1. The Complaint for Declaratory Judgment and Injunction in this case asserts that certain support service contracts entered into between the National Aeronautics and Space Administration (herein "NASA") and certain private corporations are illegal. These contracts include a number of support service contracts between NCTSI member companies and NASA. The Complaint requests a judicial declaration that such contracts are illegal and prays that the Court order such contracts cancelled and terminated. No plaintiffs are parties to any of these contracts.

2. NCTSI files this application in a representative capacity for its members which have vested in NCTSI the responsibility for representing their common interest in questions of legality and other policy considerations involved in the use of support service contracts by the Federal Government.

3. Should the Court order the relief requested by plaintiffs and declare the contracts in question unlawful, this decision would, as a practical matter, seriously impair and impede the ability of NCTSI, and its member companies, to protect their interests in such contracts, which are in major part the subject of the action herein. Furthermore, to grant the requested declaration that the specific con-

tracts are illegal would have the most serious implications on thousands of other support service contracts which NASA and many other Government agencies have entered into with member companies of NCTSI and other companies.

4. The original defendants in the Complaint may not provide adequate representation of the applicant's interest in defending the legality of support service contracts. In the past, the Civil Service Commission has asserted that certain support service contracts are unlawful. On the other hand, NASA has defended its support service contracts as being legal and fully authorized by controlling statutes. There is no clear indication at this point of time what will be the ultimate position of the counsel representing the defendants on the question of legality of the challenged contracts. Further, the original defendants may or may not choose to appeal such order as may be entered herein and may or may not elect to prosecute ultimate appeals. It is essential that applicant's interest be directly protected by its own vigorous presentation of the legality of its members' support service contracts.

Alternatively, under Rule 24(b), NCTSI seeks to intervene on the ground that its participation in the action will present questions of law and facts common to those at issue in the main action and will not unduly delay or prejudice the adjudication of the rights of the original parties.

Attached hereto in support of this Motion are an Affidavit of Edward R. Wagner, a Memorandum of Points and Authorities, and an Answer.

Respectfully submitted,

PAUL A. PORTER

JAMES F. FITZPATRICK

Counsel for
National Council of Technical
Service Industries

ARNOLD & PORTER
1229 - 19th Street, N. W.
Washington, D. C. 20036

January 10, 1968

**Affidavit of Edward R. Wagner in Support of Motion of National
Council of Technical Service Industries for Intervention
Under Rule 24, F.R.C.P.**

UNITED STATES OF AMERICA }
DISTRICT OF COLUMBIA } ss:

Edward R. Wagner, being first duly sworn, deposes and says:

1. I am Executive Director of the National Council of Technical Service Industries (herein "NCTSI"). I have held that position since the organization of NCTSI in 1965. As Executive Director I am chief operating officer of NCTSI and have authority to submit this affidavit on behalf of NCTSI in support of its Motion to Intervene in the above-captioned matter.

2. NCTSI is a nonprofit, membership corporation organized under the provisions of the District of Columbia Nonprofit Corporation Act. Pursuant to its Articles of

Incorporation, NCTSI has been organized to develop, study, examine, assemble, evaluate, publish, distribute, for the common interest of all its members, data and information of all kinds relating to the most effective and proper principles of manpower utilization, and in particular that data and information with respect to the economies, efficiencies, and flexibility afforded by full participation by private corporations and companies and providing personnel and services under contracts for essential and necessary programs, activities and operations undertaken by federal, state, local and other public and international agencies. In carrying out the purposes of the organization as stated in the Articles, NCTSI has made representations on behalf of its members in discussions before public and private bodies on the legal, cost, and policy considerations involved in the use of support service contracts by various Government agencies.

3. The members of NCTSI, as of January 9, 1968, are listed in Exhibit A. Each of these members are involved to a substantial degree in providing technical and other support services to the Government by contract. Some NCTSI member companies have been providing support services, by contract, to various Government agencies for as long as twenty-five years. Together, the membership of NCTSI provide a significant portion of more than \$4 billion of support services that Government agencies presently secure from private industry each year. Many NCTSI member companies have support service contracts with the National Aeronautics and Space Administration (herein "NASA").

4. NCTSI, on behalf of its member companies, has undertaken a detailed and comprehensive review of the statutory authorization for support service contracts. Its study, by counsel, is contained in "Critical Analysis Of Opinion Of Civil Service Commission Relating To Legality of Hiring Contract Technicians By The Department Of

Defense And Applicability Of That Opinion To Support Contracts", published by NCTSI in December, 1966. This legal Opinion, collecting the applicable statutory authorities and judicial and administrative precedents demonstrating the legality of support service contracts, is annexed as Exhibit B. In defending the legality of support service contracts of its members, NCTSI has made representations to public and private bodies, to various administrative and executive agencies, and to a Congressional Committee reviewing the legality of support service contracts (see Appendix C). In its representative capacity for its members, NCTSI has challenged the conclusions and views of the Civil Service Commission (herein "the Commission") and its General Counsel that certain support service contracts of NASA and other agencies are illegal. NCTSI has supported the assertions of the contracting agencies—such as the Department of Defense (hereinafter "DoD") and NASA—that such support service contracts are legal and fully authorized by statute.

5. In the Complaint for Declaratory Judgment and Injunctive Relief in the above-captioned case, plaintiffs have charged that NASA support service contracts to be performed at the Marshall Space Laboratories in Huntsville, Alabama are "arbitrary" and "illegal and that such contracts violate Federal personnel laws". In this Complaint plaintiffs have expressly challenged the legality of the contracts of the following NCTSI members:

Northrop Corporation of Huntsville, Alabama
Federal Electric Corporation
RCA Service Company
Computer Science, Inc.

(Complaint, paragraph 13(b)(e), paragraph 27. In addition, a number of other private corporations are charged to have entered into illegal and arbitrary support service contracts with NASA. In its requested relief, plaintiffs

ask that this Court declare that Federal personnel statutes and the regulations of the Civil Service Commission prohibit NASA:

"... from continuing to make, extend, and perform contracts at the Marshall Space Flight Center with private firms or corporations pursuant to which such firms or corporations undertake and agree, for substantial fees, profits and charges, to furnish and do furnish non-civil service employees to perform 'on-site' at the Center regular work and functions of the Government (NASA); side-by-side and in competition with civil service employees of the United States who are obligated to perform and do perform substantially the same or similar work and functions of the Government, both classes of employees performing their duties in offices, laboratories and other space or vehicles provided by the Government at its own expense; with tools, equipment and supplies furnished by the Government; and pursuant to directions and common supervision supplied by the Government and civil service supervisors; and" (Complaint, pp. 28-29).

Furthermore, plaintiffs have requested preliminary and permanent injunctive relief requiring that NASA be prohibited from removing any Federal Civil Service employee pursuant to a reduction-in-force, no matter what the need or justification, while it continues to contract with private industry through the medium of support service contracts. Plaintiffs further request that the defendant Civil Service Commission take such steps to enforce and administer the Federal personnel statutes so as

"... to prohibit defendant Webb and the agency he administers from continuing to make and perform personnel contracts with private corporations pursuant to which said corporations, for large fees and profits,

do no more than furnish non-civil service employees to NASA's Marshall Space Flight Center to perform functions of the Government which, as a matter of law, must and should be performed by civil service employees who are readily available for employment through the regular channels of the Civil Service System of the United States; and from utilizing such contracts as a means of obtaining non-civil service job replacements for civil service employees unlawfully removed from their positions with the United States; and" (Complaint, p. 31).

Plaintiffs apparently base the latter request upon their assertion that the individual Commissioners "have authority and ability, upon order of this Court, to direct the rescission, cancellation and termination of the arbitrary, illegal and capricious Federal personnel actions and contracts of NASA" (Complaint, ¶ 4).

6. The requested declaration and injunctive relief would, obviously, have the most serious and crippling effect upon the contracts of NCTSI member companies. Plaintiffs have requested that the support service contracts of NCTSI member companies be declared unlawful and illegal and, by order of this Court, terminated and cancelled. With such questions and prayers raised by plaintiffs' pleadings, it is clear that (i) NCTSI, in its representative capacity, has a valid interest in the transactions that are the subject of this action—i.e., NASA's support service contracts at Marshall Space Center—and (ii) NCTSI, in its representative capacity, is so situated that the disposition of plaintiffs' Complaint and Motion may, as a practical matter, impair and impede NCTSI's ability, and that of its member companies, to protect their interests in their support service contracts with NASA.

7. NCTSI will assert on behalf of its member companies that the NASA support service contracts subject to chal-

lenge in this action are legal and are fully authorized by statute. The legal argument of NCTSI is set forth, in substantial part, in the Opinion of counsel annexed as Appendix B. In addition, NCTSI will support the position of NASA that such support service contracts are legal. Authoritative statements of NASA on the legality of support service contracts are contained in the statement of the Administrator to the Senate Aeronautics and Space Service Committee (Appendix D) and the opinion of the General Counsel of NASA (Appendix E).

8. There is no assurance that the interests of NCTSI and its member companies in asserting and demonstrating the legality of the challenged NASA support service contracts will be adequately represented by the Department of Justice. The Civil Service Commission, through its General Counsel, has alleged that certain support service contracts are illegal; certainly, it would appear that the individual Commissioners made defendants in this action will press for adoption of that position by the Justice Department. On the other hand, NASA has staunchly defended the legality of its support service contracts. However, at this point of time it is unclear and ambiguous what position the Department of Justice ultimately may take on the question of the legality of the contracts in question. It might be that, in the course of the proceedings, the Department of Justice will assert that the Civil Service Commission has never considered the legality of the contracts at the Marshall Space Center and that the opinion of the General Counsel of the Civil Service Commission relied upon in paragraph 18 of the Complaint relates only to the two contracts which were subject to scrutiny at the NASA Goddard Space Center. Nevertheless, it also might be possible that the Civil Service Commission will assert that the contracts in question at Marshall Space Center are illegal and prevail in that position over NASA's representation that such contracts are legal. In such circumstances, it is not at all clear what the view of the De-

partment of Justice would be. In these circumstances, it is absolutely essential that NCTSI, in a representative capacity for its members, have an opportunity to present all arguments and considerations, in the most vigorous fashion, demonstrating that the support service contracts challenged in the instant suit are perfectly legal and fully authorized by the controlling statutes. Without such opportunity to participate, NCTSI and its member companies could be irreparably injured in that the Court might order their support service contracts cancelled and terminated.

9. It should be noted that NCTSI member companies in their support service activities have also been subjected to very substantial cutbacks pursuant to the recent economy mandates of Congress described in the Affidavit of Harry B. Finger, supporting defendants' Opposition to the Motion for Preliminary Injunction. Thus, both civil servants and industry employees are burdened by the decisions of the Congress requiring substantial reductions in NASA activities.

EDWARD R. WAGNER

Subscribed and sworn to before me on this 10th day of January, 1968.

SARA B. KLINE
Notary Public

My Commission expires: Oct. 14, 1969

APPENDIX A

*National Council of Technical Service Industries
Membership List*

(As of January 9, 1968)

Avco Corporation

Avco Electronics, A Division of

The Bendix Corporation

Bendix Field Engineering Corporation, A Subsidiary
of

Computer Sciences Corporation

Communication Systems, Incorporated, A Division of

Computing and Software, Incorporated

Ford Motor Company

Philco-Ford Corporation

International Telephone & Telegraph Corporation

Federal Electric Corporation

Kay and Associates, Incorporated

Litton Industries

Litcom, A Division of

Manpower, Incorporated

Northrop Corporation

Nortronics, A Division of

Radiation, Incorporated

Federal Services Division

Radio Corporation of America

RCA Service Company, A Division of

The Unitec Corporation

APPENDIX D

*NASA's Proposed Operating Plan for Fiscal Year 1968**Hearing before the Committee on Aeronautical and
Space Sciences, United States Senate*

November 8, 1967

NASA PERSONNEL CONTRACT PROCEDURES

Mr. Gehrig: Mr. Webb, would you comment on NASA's position relative to the recent decision by the Civil Service Commission that certain NASA personnel contract procedures are illegal and result in the procurement of personnel in violation of the requirements and policies of the personnel laws as administered by the Commission?

Mr. Webb: I will, Mr. Gehrig.

The opinion as rendered by the General Counsel of the Civil Service Commission had been discussed with us in several draft forms, with varying degree of what I would call realism on the part of the General Counsel of the Commission. The Commission has found, as has NASA's General Counsel, that the contracts in the form drawn are legal. However, the opinion goes into the question of whether the actual operations under the contract are legal, or as stated in the opinion that—

The contracts result in the procurement of personnel in violation of the requirements and policies of the personnel laws as administered by the Civil Service Commission.

There were at one time in the discussion, items raised such as whether or not the contracts conform to State laws.

We have tried very hard to find ways to have both the Civil Service Commission and the General Accounting Office work with us to develop forms of contracts that they would not feel impelled to criticize. One of the elements in this problem is the assertion that additional costs to the Government are incurred under support contracts as against the use of civil service personnel. In my opinion, this is not realistic. For example, the time taken to

build up a civil service competence is costly and the time required to phase down a civil service competence is greater than the time required to get rid of support contract personnel when you do not need them any more.

So in terms of total cost and in terms of meeting the needs of the National Aeronautics and Space Administration programs, I believe these contracts are legal, effective, and in the interest of the Government.

Now, instead of continuing what amounts to an argument and a difference of opinion with, as I have said, a certain lack of realism with respect to how the work in these kinds of programs has to get done, I have suggested to the Chairman of the Commission and to the Comptroller General that we join in working out a support contract pattern for the Kennedy Space Center, which is the largest that we have. I canceled a recompetition of two existing contracts at Kennedy in order to permit us to work together to try to use this as a pilot model of how the Government can solve this kind of a problem and get the work done. The Comptroller General has indicated that while he has some concern as an agent of the legislative branch in participating in such a joint action, he will be glad to meet with me and Mr. Macy. This agreement was reached last week. I hope to meet within a relatively short period of time with the two of them.

But I think the opinion of the General Counsel of the Civil Service Commission is not likely to be the end of the problem.

Mr. Gehrig: How many people do NASA support contractors employ?

Mr. Webb: About 27,000.

Mr. Gehrig: So if NASA were forced to employ all these people on the NASA payroll, it would almost double NASA employment.

Mr. Webb: This is correct, and it would be practically impossible, if not impossible, to get all the competencies required. We are in the middle of a flight-test operation on about \$18 billion worth of work.

The Chairman: Senator Stennis, do you have a question?

APPENDIX E

*NASA Rejected the Civil Service View That Certain
NASA Contracts Are Illegal*

A. Exerpts From Letter of September 5, 1967 From Paul A. Dembling, General Counsel, NASA to Leo M. Pellerzi, General Counsel, United States Civil Service Commission.

"The Congress and the Executive departments and agencies, including the Bureau of the Budget, have a long standing and well recognized practice whereby the service needs of the Government may be obtained through contracting. A legal opinion such as contained in your revised draft opinion would, therefore, have far reaching consequences on the way NASA as well as other Government agencies conduct their business. Your draft opinion would seriously impair the Government's operating flexibility as well as negating Congressional intent. NASA is authorized by statute to determine the most effective way of carrying out its missions, utilizing to the best advantage the manpower and capabilities of civil service, industry, and universities. Your draft opinion would change a long recognized legal method of contracting for services.

"It is NASA's conclusion that the Melpar and EMR contracts as written and administered do not violate the Federal personnel laws. In the first instance, the issue involves a federal question which is governed by federal law rather than the state law which is cited by the draft opinion. The federal cases support NASA's position that Melpar and EMR are independent contractors. Secondly, the provisions of 5 U.S.C. 2105(a) are controlling in determining whether an individual is to be considered an employee of the Government. On the basis of this statute (which is a codification of a prior Civil Service Commission regulation), the employees of Melpar and EMR do not constitute employees of the Government. Furthermore, the Comptroller General has reviewed these contracts and found that they 'were drawn so as to avoid creating an

employer-employee relationship between Government supervisors and contractor-furnished personnel. . . .'

"We do recognize that in the performance of these contracts, as pointed out by the Commission's study, an employer-employee relationship between the Government and an individual contractor's employee may have been created due to direct Government supervision. This relationship could possibly create litigation over whether a particular employee would be entitled to Federal benefits under Civil Service laws as well as create potential Government liability in the Federal tort claims area in a case involving one of these employees. Isolated instances of supervision in violation of the contracts do not affect the independent contractor status of these contractors. Nevertheless, we plan to rectify all these violations. If they cannot be remedied, NASA will take all necessary action to have these functions performed by Civil Service employees.

"To facilitate corrective action, NASA is conducting a broad study of its support service contracts to evaluate the basis for decisions to contract out, to evaluate the administration of the contract to assure they conform with sound management practice and applicable statutes, and to assure that the costs of such are carefully considered as an important factor in determining the best means for providing the services required. In addition, NASA has invited the Civil Service Commission, the General Accounting Office, and the Bureau of the Budget to combine in a joint effort to develop the most effective methods of providing support functions at the Kennedy Space Center."

B. Exerpts From "NASA Legal Memorandum Analyzing Civil Service Commission Office of General Counsel, 'Study Of Selected Contracts' (Melpar, Inc., and Electro-Mechanical Research, Inc.), Dated August 8, 1967."

"The Civil Service Commission General Counsel in its draft opinion attempts to overrule Government practice on procurements of services. The procuring agencies

through long standing administrative interpretation of statutory authority and judicial precedents have obtained services through contracts with the industrial community. A change in Government procurement practices as fundamental as that contemplated by the draft opinion should be effected by an act of the Congress.

• • •

“The Congress has specifically established the authority of NASA to enter into contracts including service contracts. The National Aeronautics and Space Act of 1958, as amended (42 U.S.C. 2451) provides in section 102(c):

The aeronautical and space activities of the United States shall be conducted so as to contribute materially to one or more of the following objectives:—(8) The most effective utilization of the scientific and engineering resources of the United States, with close cooperation among all interested agencies of the United States, in order to avoid unnecessary duplication of effort, facilities and equipment.

“Section 203(b) authorizes the Administrator:

(5) . . . to enter into and perform such *contracts, leases, cooperative agreements, or other transactions, as may be necessary in the conduct of its work and on such terms as it may deem appropriate, . . .* with any person, firm, association, corporation, or educational institution. (Emphasis supplied).

“NASA’s existing authority under its organic act to use support services contracts has been recognized in NASA’s annual authorization legislation. (NASA Authorization Act, 1966, June 28, 1965) (P.L. 89-53) The language in this Authorization Act provides, in Section 1(d):

(2) maintenance and operation of facilities, and support services contracts may be entered into under

the "Administrative operations" appropriation for periods not in excess of twelve months beginning at any time during the fiscal year.

"Identical provisions appear in the NASA Authorization Acts 1967 and 1968. (P.L. 89-528 and P.L. 90-67) The Independent Offices Appropriation Act of 1966, August 16, 1967, P.L. 89-128, provides: 'That contracts may be entered into under this appropriation for maintenance and operation of facilities, and for other services, to be provided during the next fiscal year.' Similar language appeared in the 1967 Appropriation Act for 1968. While admittedly this legislation was enacted to provide for fiscal year cross-over authority, nonetheless it gives a clear indication of Congressional recognition of NASA's authority to enter into support services contracts.

• • •
 "The court in *Powell v. United States Cartridge Co.*, 339 U.S. 497 recognized the Government's right, and indeed its obligation under our free enterprise system of Government, to use the resources and capability of private industry to the maximum extent possible. The court at p. 506 stated:

It would have been simple for the government to have ordered all of this production to be done under governmental operation as well as under governmental ownership. To do so, however, might have weakened our system of free enterprise. We relied upon that system as the foundation of the general industrial supremacy upon which ultimate victory might depend. In this light, the government deliberately sought to insure private operation of its new munitions plants.

• • •
 In these great projects built for and owned by the Government, it was almost inevitable that the new equipment and materials would be supplied largely by the Government and that the products would be

owned and used by the Government. It was essential that the Government supervise closely the expenditures made and the specifications and standards established by it. These incidents of the program did not, however, prevent the placing of managerial responsibility upon independent contractors.

• • •

The relationship of employer and employee between the worker and the contractor appears not only in the express terminology that has been quoted. It appears in the substantial obligation of the respondent contractors to train their working forces, make job assignments, fix salaries, meet payrolls, comply with state workmen's compensation laws and social security requirements and to 'do all things necessary or convenient in and about the operating and closing down of the Plant, . . .'

"The CSC Office of General Counsel draft opinion is attempting to upset well established procurement practices through questionable legal means. The existing authority of Executive departments and agencies to contract for support services in the manner exemplified by the Melpar and EMR contracts has long been recognized by the Congress, the Courts, and the Executive departments and agencies including the Bureau of the Budget. A fundamental change in these practices, such as proposed by the draft opinion, is more properly within the province of the Congress of the United States. In addition the effect of the draft opinion is to allow parties suing the Government, either for Federal personnel benefits, or for tort, to rely on the opinion as a basis for such action.

"Conclusion

"Based on the foregoing analysis, the question of employment by the Government is a federal question which is governed by federal law. Under the applicable federal

law Melpar, Inc., and Electro-Mechanical Research, Inc., are independent contractors. Secondly, the criteria for federal employment codified in 5 U.S.C. 2105(a) are controlling with respect to the status of the contractor employees. Since the employees of Melpar and EMR do not meet these criteria, they are not employees of the Government. Therefore, it is concluded that Melpar and EMR contracts, both as written and administered, do not violate the federal personnel laws and are a proper and legal exercise of NASA contracting authority."

**Answer of National Council of Technical Service Industries.
Intervenor, to Plaintiffs' Complaint**

Intervenor National Council of Technical Service Industries (herein "NCTSI"), a not-for-profit membership corporation organized and existing under the laws of the District of Columbia with its principal place of business in the District of Columbia, by counsel, files this Answer in compliance with Rule 24(c) of the Federal Rules of Civil Procedure and respectfully answers and alleges as follows:

1. NCTSI is without knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 1, except that it specifically denies that any of the acts of the defendants thereafter alleged are arbitrary, unlawful and capricious.
2. NCTSI is without knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 2.
3. NCTSI admits the averments of sentence 1, paragraph 3.
3. NCTSI denies the averments of sentence 2 of paragraph 3.
4. NCTSI is without knowledge and information sufficient to form a belief as to the truth of the allegations con-

tained in sentence 1 of paragraph 4. NCTSI denies the averments of sentence 2 of paragraph 4.

5. NCTSI denies the averments contained in paragraph 5.

6. To the degree that paragraph 6 sets forth factual assertions, NCTSI denies such averments.

7. NCTSI is without knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 7.

8. NCTSI denies the averments contained in paragraph 8.

9. NCTSI admits the averments of sentence 1 of paragraph 9. NCTSI denies the averments of sentence 2 of paragraph 9. NCTSI is without knowledge and information sufficient to form a belief as to the truth of the allegations contained in sentence 3 of paragraph 9. NCTSI denies the averments of sentence 4 of paragraph 9.

10. NCTSI denies the averments of paragraph 10.

11. NCTSI denies the averments of paragraph 11.

12. NCTSI denies the averments of paragraph 12.

13. NCTSI is without knowledge and information sufficient to form a belief as to the truth of the allegations contained in the heading sentence of paragraph 13, except that it specifically denies the averments relating to the "total illegality of these arrangements . . ." NCTSI is without knowledge and information sufficient to form a belief as to the truth of the allegations contained in subparagraph (a) of paragraph 13. NCTSI is without knowledge and information sufficient to form a belief as to the truth of the allegations contained in subparagraph (b) of paragraph 13, except that it admits that NASA has contracts with Northrop Corporation of Huntsville, Alabama and Federal Electric Corporation. NCTSI is without knowledge and information sufficient to form a belief as to the

truth of the allegations contained in subparagraphs (c), (d), and (e) of paragraph 13.

14. NCTSI is without knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 14, except that it admits that the document marked Exhibit B to the Complaint was released.

15. NCTSI is without knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 15.

16. NCTSI is without knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 16.

17. NCTSI admits that Exhibit C was rendered as asserted in the paragraph and that the quotations set forth are excerpts from Exhibit C. NCTSI specifically denies that these excerpts form an accurate and true statement of the conclusions and findings of that report.

18. NCTSI admits that Exhibit D was rendered as asserted in the paragraph and that the quotations set forth are excerpts from Exhibit D. NCTSI specifically denies that these excerpts form an accurate and true statement of the conclusions and findings of that report.

19. NCTSI is without knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 19.

20. NCTSI is without knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 20, except that NCTSI specifically denies the averments of "totally unlawful personnel contracts," "the illegal employment of thousands of non-civil service employees of these private contractors who are unlawfully working for the Government," and "the millions of dollars in illegal and totally unnecessary fees and profits".

21. NCTSI is without knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 21.

22. NCTSI denies the averments of paragraph 22.

23. NCTSI is without knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 23.

24. NCTSI is without knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 24.

25. NCTSI is without knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 25.

26. NCTSI is without knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 26.

27. NCTSI is without knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 27.

28. NCTSI is without knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 28.

29. NCTSI is without knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 29, except that, on information and belief, NCTSI avers that responsible officials in the Civil Service Commission have notified the President of plaintiff Union by telegram asserting that the Opinion of the General Counsel of the Civil Service Commission referred to in paragraph 18 of the Complaint applies only to the two NASA support service contracts at Goddard Space Center and has no applicability to the legality of any other NASA support service contracts at Marshall Space Center or elsewhere, not specifically examined in the Civil Service Opinion.

30. NCTSI is without knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 30.

31. NCTSI denies the averments of paragraph 31.

32. NCTSI denies the averments of paragraph 32.

AFFIRMATIVE DEFENSES

1. The Complaint should be dismissed because of the failure of plaintiffs to exhaust their administrative remedies; because plaintiffs have a plain and adequate remedy at law and cannot show irreparable injury cognizable in equity; and because this suit is an unconsented suit against the United States barred by the doctrine of sovereign immunity.

2. The Complaint should be dismissed to the extent that it asserts that support service contracts between NASA and members of NCTSI are illegal. Plaintiffs are not parties to those contracts. They have no standing or judicially-cognizable interest which permits them to challenge the legality of such contracts. There is no statute that vests plaintiffs with such an interest.

3. In any event, the support service contracts here challenged are legal and fully authorized by the applicable statutes and judicial and administrative decisions.

Respectfully submitted,

PAUL A. PORTER

JAMES F. FITZPATRICK

Attorneys for

The National Council of Technical
Service Industries

ARNOLD & PORTER

1229 - 19th Street, N. W.

Washington, D. C. 20036

January 10, 1968

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3261-67

LODGE 1858, AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, ET AL., *Plaintiffs,*

v.

JAMES E. WEBB, Administrator, NASA, et al., *Defendants.*

Washington, D. C.

January 11, 1968.

The above cause came on for hearing of motion for preliminary injunction before THE HONORABLE ALEXANDER HOLTZOFF, United States District Judge, at 10:00 a.m.

Appearances:

For the plaintiffs:

EDWARD L. MERRIGAN, Esq.

For the Defendants:

GIL ZIMMERMAN, Esq.

Asst. United States Attorney

For the Applicant for Intervention:

PAUL T. PORTER, Esq.

2

PROCEEDINGS

The Deputy Clerk: Lodge 1858, American Federation of Government Employees and others v. James E. Webb and others.

Mr. Merrigan: Good Morning, Your Honor.

I am Edward Merrigan, counsel for the plaintiffs in this case.

Of course, Your Honor, as you probably know, this is a motion for preliminary injunction.

The Court: That is the only thing I know about it. I don't know what kind of an injunction or anything else.

Mr. Merrigan: I know that, Your Honor, and, of course, we apologize for this case coming to you at the last minutes, but I understand Judge Hart is ill.

The Court: That is what I am here for.

Mr. Merrigan: Yes, Your Honor.

Your Honor, the plaintiffs in this are six employees who have been employed for periods up to twenty-nine and thirty years at the George Marshall Space Flight Center of NASA, the National Aeronautics and Space Administration.

The Court: They have been employed where?

Mr. Merrigan: At the Marshall Space Flight Center of NASA, the National Aeronautics and Space Administration, in Huntsville, Alabama.

3 They are joined in this case, Your Honor, by Lodge 1858 of the American Federation of Government Employees, which, of course, Your Honor, is a union of federal government employees.

They sue in this case, Your Honor, Mr. Webb, who is the Administrator of the National Aeronautics and Space Administration, and they sue the Civil Service Commissioners, the three Commissioners, and those are the defendants in the case.

Now, Your Honor, the relief sought here is that the defendant Webb proposes to remove these six employees and approximately 650 other Civil Service employees from their positions at the Center, without any fault on their part, all as part of a reduction in force at the Center.

The verified complaint before the Court and the affidavits show, Your Honor, that these Civil Service employees are going to be dismissed unless the Court grants the preliminary injunction sought today.

The case was filed approximately two weeks ago.

The notices of the reduction in force were served on these employees around the second week of December.

4 NASA, Your Honor, was created pursuant to an Act of Congress in 1958.

The Court: What is the ground of your motion?

Mr. Merrigan: The ground of the motion, Your Honor, is this, that these Civil Service employees—well, let me start this way, the ground for the motion, Your Honor, is this, that NASA under its own statute, that is, the 1958 Act which created NASA, requires NASA, as a matter of law, to staff its operation and to perform its functions solely with Civil Service employees, except to the extent that Congress has given specific exceptions by law. That is the first ground. We say—

The Court: Are they hiring other employees in place of these?

Mr. Merrigan: Yes, Your Honor.

What has happened over a period of the last five or six years is that the defendant Webb has embarked upon a course of conduct where they have been entering into contracts with private contractors to furnish non-civil service employees to work in the same offices, at the same benches, at the next typewriters, with Civil Service employees. They pay these contractors a fee to obtain these non-civil service employees and to put them to work in the same offices and in the same laboratories and in the same work shops and at the guard posts and at the same chauffeur positions, almost man for man down the line with Civil Service employees.

The Court: Are they paid the same salaries?

Mr. Merrigan: Your Honor, no; what NASA has been doing is entering into these contracts which provide that NASA pays the contractor. They pay the contractor a fee for getting these people, they pay the contractor an incentive award for getting these people and then, of course, paying the contractor, the contractor pays the non-civil service employees.

The Court: I understand, but my question implied are the employees getting the same pay as Civil Service employees?

Mr. Merrigan: In some cases less, in some cases more. They are not being paid in accordance with federal law.

Also, Your Honor, we say that that violates the provisions of the Act pursuant to which NASA was created, because under that specific Act NASA's employees are supposed to be paid in accordance with the Classification Act of 19—whatever it is, Your Honor.

The Court: Let me see if I understand your statement of facts correctly. You mean that instead of having government employees perform ordinary routine clerical functions and mechanical functions at the plant, the Administrator makes a contract with an outside concern to perform those functions and the outside concern brings in its employees to do the work?

Mr. Merrigan: Yes, Your Honor.

The Court: Is there anything in the law permitting that?

Mr. Merrigan: We say absolutely not, Your Honor, and besides, as recently as October of 1967 one of the exhibits to the verified complaint is an opinion by the General Counsel to the Civil Service Commission, given to the Commissioners which says that these contracts are absolutely illegal, proscribed by federal law, and that they should be canceled wherever shown to be illegal.

We also have annexed—

The Court: You say these employees are going to be separated as of tomorrow?

Mr. Merrigan: Tomorrow, Your Honor.

The Court: And how many are there?

Mr. Merrigan: 640 of them, Your Honor.

The Court: Is this a class suit?

Mr. Merrigan: The six plaintiffs sue for themselves, Your Honor. Lodge 1858 of the American Federation of Government Employees has a collective bargaining agreement with NASA.

The Court: There is a collective bargaining agreement?

Mr. Merrigan: Yes, Your Honor, and they sue in behalf of themselves—

The Court: Is this an economy move or is it a move to substitute work by contract for work done by government employees?

Mr. Merrigan: Well, Your Honor, Congress, as you recall, at the last session was very economy minded and, of course, NASA was one of the agencies that was told to reduce its budget. NASA has to reduce its budget, I mean its operating functions, there is no question about it. But what NASA is proposing to do, and we say is illegal, is to dismiss these federal employees, these Civil Service employees, while retaining in the identical work, doing the identical functions and will continue to do it after the RIF, the contractor employees; and we say, Your Honor, that that violates the—

The Court: Is that an economy move? Will that save any money for the Government?

Mr. Merrigan: I should say it will not because, Your Honor, under the exhibits to the complaint the Comptroller General says, if you stop paying these fees to the contractor and if you hire Civil Service employees,

8 Mr. Webb, as you are supposed to do, you will save the Government \$5,000,000 on just two of these contracts that he reviewed at the Marshall Center.

So I think that if Mr. Webb wanted to obey the law, number one, and if Mr. Webb wanted to obey the report of the Comptroller General to the Congress, which is annexed to the complaint, and if he wanted to obey the opinion of the Civil Service Commission counsel, he would terminate these contracts.

Your Honor; this wouldn't mean breaching the contracts because in March and April these contracts terminate by their own terms. They are contracts for one year renewable solely at the option of the Government on their anniversary date. So in March Mr. Webb could well comply with the instructions of the Congress to reduce his budget by terminating these contracts at least to the extent necessary to keep these employees.

None of them have done a thing. They are not charged with anything, they are simply being reduced because they are bodies—

The Court: Is it the plan of the Administrator not to renew the contracts, as well as to dismiss the Civil Service employees?

9

Mr. Merrigan: There is every indication in the world that the Administrator intends to continue these contracts in full force and effect. The only thing that he has done under those contracts as a sort of quid pro quo, to make it look fine, is to reduce some of the contract employees while he is reducing some of the Civil Service employees.

The Court: What type of Civil Service employees are involved here?

Mr. Merrigan: We would have some veteran employees, Your Honor, who, as you know, have a veteran's preference.

The Court: No, I mean what type of work do they do?

Mr. Merrigan: Well, let's start with the lowest and go to the top. We have chauffeurs, we have guards who patrol the base. In fact, Your Honor, let me stop with the guards for a minute. Congress has provided that insofar as guards and custodial employees are concerned, no non-preference, that is, no veteran employee, even a non-veteran—

The Court: My question to you is—don't go off on a tangent—what types of employees are involved?

Mr. Merrigan: Starting with chauffeurs, guards, Wage Board employees—

10 The Court: I mean what work do they do?

Mr. Merrigan: Metal workers, carpenters, plumbers.

The Court: So-called Wage Board employees are not Civil Service, are they?

Mr. Merrigan: They are Civil Service, Your Honor, but they are paid on a basis of a wage board determination of what is a fair rate and that is keyed to some degree with industry.

Now when you go up the line—

The Court: These employees are mechanics, in other words?

Mr. Merrigan: Mechanics.

The Court: That is what I wanted to know.

Mr. Merrigan: I apologize, Your Honor. They are mechanics. Then you go up the line, Your Honor—

The Court: You mean the Administrator proposes to contract out this mechanical work to a contractor and have it done by contractor's employees at the government plant?

Mr. Merrigan: Yes, Your Honor.

The Court: Very well.

Mr. Merrigan: And these contracts, of course, are not the kind of contracts that provide for the building of a rocket or the building of a space ship. It just means
11 in order to avoid hiring a Civil Service man you get a contractor in, you make a contract with him and cover up the whole thing because it looks like a space contract and you employ a bunch of non-civil service employees.

Going up the line, you'd have secretaries, Your Honor, you'd have engineers who are Civil Service engineers versus contractor engineers, all working together performing the same work.

The Court: By engineers do you mean professional engineers?

Mr. Merrigan: Yes, Your Honor.

The Court: I thought you said all these people were mechanics, Wage Board employees.

Mr. Merrigan: No, Your Honor, I started at the bottom and I said I would work up.

The Court: Just enumerate the types of employees, without any comment.

Mr. Merrigan: All types of employees, Your Honor, from professional employees on down to the most menial type.

The Court: Will you enumerate the types of employees, please?

Mr. Merrigan: Your Honor. as I stated before, mechanics, chauffeurs, guards, secretaries, specialists,
12 technicians.

The Court: What do you mean by specialists?

Mr. Merrigan: A man is an industrial specialist, such as the plaintiff Brouillette. He works his way up from a mechanic and then they call him an industrial specialist.

Engineers who perform work as an engineer, as a professional, Your Honor. Most of them are Civil Service employees—

The Court: In other words, they are in various grades.

Mr. Merrigan: Yes.

The Court: How many are there who are affected by these notices?

Mr. Merrigan: 640, Your Honor.

The Court: How many employees are there altogether at that particular plant?

Mr. Merrigan: 13,000, including Civil Service and contractor.

The Court: And they are dismissing 600 out of the 13,000?

Mr. Merrigan: 640, Your Honor.

The Court: And how much notice have they had?

Mr. Merrigan: They have had, Your Honor, since
13 December 6th.

The Court: They have had a little more than a month's notice.

Mr. Merrigan: That is correct, Your Honor.

The Court: Of course, many of them, I presume, will have accumulated leave, won't they?

Mr. Merrigan: Some, Your Honor, will have, yes, accumulated leave.

But, Your Honor, of course, upon these dismissals, after 30 years of government service these people now are faced with unemployment. That is first of all.

Some of them, to gain any employment, will have to travel from Huntsville, Alabama to places like New Orleans, where there is an installation, other out to California, some to Florida.

The Court: Is the agency offering them other jobs in other plants, other stations?

Mr. Merrigan: In a very, very small percentage of the cases the agency has tried to place some of them in other jobs. In the great majority of cases the answer is no, they will have to shift for themselves.

In some cases, Your Honor, as the affidavits show, they will have to sell their homes, they will have to break
 14 their leases, they will have to take their children out of school, and they will suffer all sorts of irreparable damages, Your Honor, that cannot possibly be prevented.

Now, Your Honor, as we say, this violates the 1958 Act and I have more specifically in mind 42 USC 2473(b).

The Court: What Act are you talking about? I can't bear in mind every section of 50 different titles of the United States Code.

Mr. Merrigan: I understand that, Your Honor. What I am talking about there is the National Aeronautics and Space Act of 1958.

The Court: What provision?

Mr. Merrigan: 42 USC 2473(b).

The Court: What does it provide?

Mr. Merrigan: It provides, Your Honor—

The Court: Give me that citation again.

Mr. Merrigan: 42 USC 2473(b).

The Court: Very well.

Mr. Merrigan: 2473, Your Honor, is the section, it is the heart of the Act, it is the heart of the 1958 act. First of all, it tells NASA what its functions are to be. It is to carry out space activities. Then in the very next section Congress says, in the performance of its
 15 functions the Administrator is authorized to appoint and fix the compensation of such officers and employees as may be necessary to carry out such functions, such officers and employees shall be appointed in accordance with the Civil Service laws and their compensation fixed in accordance with the Classification Act of 1949.

The only exception to that, Congress goes on specifically to state, is that NASA has the right to hire 425 scientific,

engineering and administrative personnel without reference to the Civil Service laws.

The evidence before the Court shows that out of those 13,000 employees at the Center 45 percent now, today, are non-civil service contractor employees and 55 percent are civil service. So, they have gotten these non-civil service people, for these fees paid to contractors, up to almost 6,000 out of 13,000. We say that violates that provision of the law.

Your Honor, we also contend in this case that NASA's actions here violate the job retention rights of these employees under Title 5 of the United States Code 3502. In that section, Your Honor, which I know you are familiar with because I think you have had cases of this nature, it says that a preference eligible employee, which, of course, is a Civil Service—

16 The Court: What is the point you are raising?

Mr. Merrigan: The point is, Your Honor, that Title 5 of the United States Code says that a Civil Service employee cannot be removed in a reduction in force when a competing employee without equal or more retention rights is retained, a competing employee.

The Court: Give me that section number again, please.

Mr. Merrigan: Title 5 USC 3502.

The Court: Very well, you may proceed.

Mr. Merrigan: As I say, Your Honor, that section specifically says that a preference eligible employee is entitled to be retained in preference to other competing employees.

Then 3502(a) sets forth that the Civil Service Commission shall—

The Court: Suppose we go back. Let's take one step at a time. You referred to 2473(b). That is a section with many sub-paragraphs.

Mr. Merrigan: I am talking about (b)(2), Your Honor.

The Court: Are you referring to the provision
17 reading, "To appoint and fix the compensation of such officers and employees as may be necessary to

carry out such functions," is that the provision you are referring to?

Mr. Merrigan: Yes, and the provision on the next page, Your Honor, right at the top.

The Court: Yes. There is nothing here about contracting out the performance of—

Mr. Merrigan: No, there certainly isn't, Your Honor.

The Court: What is the section in Title 5 you rely on?

Mr. Merrigan: 3502, Your Honor.

The Court: What provision of it do you rely on?

Mr. Merrigan: Well, Your Honor, 3502(a), as you notice says that the Civil Service Commission shall prescribe regulations for the release of competing employees in a reduction in force which give due effect to, one, tenure of employment, military preference, length of service, efficiency of performance ratings.

So, the first thing we will have to do, Your Honor, in just a moment, is look at the Civil Service Commission Regulation.

The Court: That is correct.

18 Mr. Merrigan: Then you go over, Your Honor, to 3502 for a moment and it says a preference eligible employee whose efficiency or performance ratings is good or satisfactory is entitled to be retained in preference to other competing employees.

The point here, Your Honor, is that all of these employees being removed are, one, preference eligibles, these Civil Service employees, and for this case it is conceded that all have performance ratings which are good or satisfactory. No one contends that they have bad performance ratings.

The Court: Are many of these men preference eligibles?

Mr. Merrigan: They are all preference eligibles.

The Court: On what basis?

Mr. Merrigan: Under the definition of preference eligible, Your Honor. If you will abide with me just a moment, please—

The Court: Suppose you tell me in your own words, Mr. Merrigan.

Mr. Merrigan: They are preference eligibles because that is the definition of a preference eligible, Your Honor. I think it is 5 USC—

The Court: Don't read me anything, just tell me
19 what a preference eligible is, will you please?

Mr. Merrigan: If Your Honor will give me just—

The Court: No, look up and tell me. Never mind the book. What is a preference eligible?

Mr. Merrigan: A preference eligible is defined in Title 5.

The Court: What is he?

Mr. Merrigan: A Civil Service employee, Your Honor, in effect. A preference eligible is a Civil Service employee.

The Court: You mean every Civil Service employee is a preference eligible, is that what you contend?

Mr. Merrigan: Every Civil Service employee who has a permanent appointment, Your Honor, that is correct.

The Court: Is a preference eligible?

Mr. Merrigan: That is correct, Your Honor.

The Court: Very well.

Mr. Merrigan: I can give you the section. This is something I can't remember offhand, unfortunately, Your Honor, I think it is 3511, but I may be wrong about that.

The Court: Well, proceed. You have answered my question.

I did not understand that every permanent Civil
20 Service employee was a preference eligible. I thought a preference eligible was an employee who had veteran's preference.

Mr. Merrigan: No, that used to be the definition of preference eligible, but Your Honor will notice that Title 5 was re-codified in 1966 and a preference eligible is defined in Title 5 as a Civil Service employee who has a permanent appointment, as distinguished from one who has a temporary.

The Court: I think you better find that definition, then, because that is new to me.

Mr. Merrigan: 5 USC 7511, Your Honor.

The Court: Suppose you read that definition.

Mr. Merrigan: It defines a preference eligible employee to mean a permanent or indefinite preference eligible who has completed a probationary or trial period as an employee of an executive agency or as an individual employed by the Government of the District of Columbia, but does not include an employee whose appointment is required by Congress to be confirmed by or made with the advice and consent of the Senate, except an employee whose appointment is made under 3311 of Title 39. That is a preference eligible.

The Court: Very well.

Mr. Merrigan: Now the Civil Service Commission,
21 Your Honor, under 3502 has adopted regulations, as

I know Your Honor knows, and the specific provision is 5 CFR, Your Honor, 20.5, as I recall, and specifically, Your Honor, in that provision the Civil Service Commission states bluntly that a preference eligible Civil Service employee cannot be reduced in a reduction in force while competing employees with less retention rights are retained.

In this case we say the non-civil service employees have no retention rights whatsoever and they are working at the NASA Center, they are being paid with NASA's funds, they are being supervised by NASA Civil Service employees, they are working side by side with these Civil Service employees and they are performing the identical work as these Civil Service employees.

Any doubt about that, Your Honor, is dispelled by one of the exhibits to the affidavit in this case, which sets forth the manpower status summary of the Center as of the current time. The first one shows on-board Civil Service personnel and the other one shows on-board support contractor personnel. These sheets show, Your Honor, that in every function at the Center there are hundreds of Civil Service and hundreds of contractor employees employed by the Agency working simultaneously together.

22 The Court: And none of the contract employees are being severed, is that it?

Mr. Merrigan: They have severed some of the contract employees, Your Honor, as I mentioned a while ago, as a sort of effort to say, well, we are giving some sort of quid pro quo, we are reducing contractor people.

The burden of our case, Your Honor, is that, in line with the recent opinion of the Civil Service Commission, as long as you retain these contractor employees, non-civil service people, in the same jobs, at the same place, working side by side, these are people employed pursuant to illegal contracts, they are illegally employed, and under the statutes they have no retention rights and therefore you can't reduce these people until you—

The Court: Whose opinion is that?

Mr. Merrigan: The Civil Service Commission, and it is attached—

The Court: A formal ruling of the Civil Service Commission? Have you a copy of it here?

Mr. Merrigan: It is an exhibit to the complaint, Your Honor.

The Court: I am not going to go through the voluminous file when counsel is here and can give me a copy.

23 Mr. Merrigan: Exhibit D, Your Honor.

The Court: That is one advantage of oral arguments, the Judge can ask questions, whereas—

Mr. Merrigan: It is not this whole book, Your Honor (indicating).

The Court: Give me the particular opinion that you rely on.

Mr. Merrigan: Would you give that to His Honor, please?

The Court: This is not an opinion of the Commission, this is an opinion of the General Counsel of the Commission.

Mr. Merrigan: That is correct, but the Commission—

The Court: I think that makes a difference.

Mr. Merrigan: —the Commission has adopted it, Your Honor.

The Court: This is a long opinion. Suppose you point out the particular passages in it.

Mr. Merrigan: Yes, Your Honor.

The Court: Mark the particular passages you rely on with a pencil mark of some kind.

Mr. Merrigan: Well, at page 36, Your Honor, the Counsel sets forth his conclusions.

24 The Court: That is what I want.

Mr. Merrigan: Here they are, Your Honor.

The Court: Thank you. Very well, you may proceed.

Mr. Merrigan: In that opinion, as Your Honor noted, the Counsel concluded, really, that NASA has no legal authority to contract for personnel services without regard to the personnel laws. That is number one.

Then his next heading, Your Honor, Conclusions, "The contracts under review are unauthorized." The third provision in his opinion is, "The contracts under review do not conform to Executive Branch policy." He then concludes, "The Civil Service system can supply the necessary personnel." Finally, he concluded—

The Court: This opinion was rendered in connection with what?

Mr. Merrigan: Since 1962, Your Honor, or maybe previous to that, I don't recall, but since 1962 the General Accounting Office and the Civil Service Commission have been investigating NASA's contract practices and—

The Court: This opinion was rendered in connection with this particular agency and not some other agency?

Mr. Merrigan: No, Your Honor, in this agency. This is the Goddard Center, as opposed to the Marshall
25 Center. The two Centers are identical. The contracts are form contracts, they are substantially identical.

The Court: I might say I used to be a government employee for 21 years and this is the first time I have heard of government agencies on a large scale instead of hiring employees, contracting out for services to be performed in

government departments. You might as well do away with the Civil Service law if that practice is accepted.

Mr. Merrigan: It is a dead letter. On the 13th of January—

The Court: Certainly none of the regular executive departments ever do that, so far as I am aware.

Mr. Merrigan: I think the Defense Department has been guilty of this defalcation from time to time, Your Honor, and I would to just hand Your Honor—

The Court: I think there was some agency or other that contracted out the cleaning and janitorial services and I think that was stopped.

Mr. Merrigan: Your Honor, this situation has gotten so bad at the Marshall Center that guards who under 5 USC 3310 must be veteran preference employees, have been completely removed and that is a complete contractor situation now. Custodial employees who are supposed to be entirely preference eligibles at the Center, the majority of these are contractor employees today.

Here I have in my hand an exhibit that was put in this case yesterday by the proposed intervenor and it quotes—

The Court: Who is the proposed intervenor?

Mr. Merrigan: It is an association called the—well, it is an association that, really, lobbies for these contractors here in Washington.

The Court: What is the name of the intervenor?

Mr. Merrigan: The National Council of Technical Service Industries.

The Court: I see. That is not before me on this motion, Mr. Merrigan.

Mr. Merrigan: No, Your Honor. I was referring to an exhibit that came in. I didn't know about it until—

The Court: Is that in the record on this motion?

Mr. Merrigan: Well, Your Honor, what it is is a page from testimony given by the defendant Webb.

The Court: I understand. Is that part of the record on this motion?

Mr. Merrigan: Not in my papers. It came from the intervenor, Your Honor. What it points out—

27 The Court: I shall only consider the papers which are before me on this motion, Mr. Merrigan.

Mr. Merrigan: All right, Your Honor.

The Court: Is there anything else you would like to say?

Mr. Merrigan: Yes, Your Honor, I would, please.

After the opinion was rendered by the General Counsel to the Civil Service Commission which is before Your Honor, NASA wrote to the General Counsel and wrote to the Commission, saying we plan to rectify all these violations. That is part of the record before Your Honor. If they cannot be remedied, NASA will take all necessary action to have these functions performed by Civil Service employees.

The Court: When was that letter written?

Mr. Merrigan: That letter was written in 1967, after that opinion was—

The Court: When in 1967?

Mr. Merrigan: September or October, Your Honor. at the time that opinion was made available to NASA by the Civil Service Commission.

The Court: When was this opinion rendered?

Mr. Merrigan: It is dated October '67. It was given to NASA in draft form, as I understand it, in either
28 August or September of '67.

The Court: When was it issued?

Mr. Merrigan: October of '67, Your Honor. In other words, it is recent.

And the papers before the Court today, the affidavit of NASA, shows today two things: one, NASA still doesn't know which of its functions it claims are violating the law and, therefore, it proposes, after this reduction in force, to continue to investigate for a while to determine what is legal and what is illegal.

The Civil Service Commission, on the other hand, files an affidavit saying that it too intends to continue to investigate.

We say, Your Honor, that while these agencies are trying to determine what is legal and what is not legal at the Center, these employees should be retained until they can determine what is a violation of law and what isn't.

The Court: Very well.

Mr. Merrigan: Briefly, Your Honor, if I can, there are precedents in this circuit. First of all, of course, Your Honor, I think you are familiar with Reynolds against Lovett, which was a decision of the Circuit Court here which held that the Secretary of the Navy, who
29 changed his policy and wanted to retain non-preference employees over preference employees, had no right to do that, that the law governed, not his policy.

Roth against Brownell, that is a case I am sure Your Honor is familiar with, it involved the Department of Justice, where Attorney General Brownell simply removed Mr. Roth without any reference whatever to the Civil Service laws. The Court of Appeals directed that he be reinstated. In that decision by the Court of Appeals certiorari was denied by the Supreme Court.

More specifically, Your Honor, with regard to the right of the Court to preserve the status quo here until the issues can be determined, first, by the Civil Service Commission in the administrative proceeding, not by the Court on the merits first, but the Commission itself, and at the end of the Commission's proceedings, by the Court, if necessary, that is, when we get jurisdiction, such as Reynolds against Lovett, there is a decision of this Court by Judge Youngdahl in Group against Finletter, where he—

The Court: The Court has no doubt as to its power to issue an injunction.

Mr. Merrigan: All right, Your Honor.

We say, Your Honor, too, if you please, that the
30 Court, in granting this injunction, would not only be granting this injunction to protect the rights of the plaintiffs against irreparable damage but you would be granting this injunction in the public interest to permit the

defendants time to put into effect the opinion of the Civil Service Commission and also, Your Honor, it would stop the government from this situation: if these people are reduced and put off the base tomorrow and then they appeal to the Commission and six months from now, eight months from now, the Commission rules they were illegally dismissed, the government under the back pay act would have to pay them all their back pay—

The Court: It won't if they get another job in the meantime, and if they don't get another job they will have to show that they made diligent efforts to get another job.

Mr. Merrigan: Indeed, but, Your Honor, to the extent that the government has to pay under the Act the government would be suffering damage there too. So, what I am trying to say, this is not a case where the injunctive relief granted by the Court wouldn't help the government.

The Court: What is the permanent relief that you ask in this action?

Mr. Merrigan: In this action, Your Honor, we would ask the Court, after the status quo is preserved—

31 The Court: What is the permanent relief that you ask?

Mr. Merrigan: A permanent injunction, Your Honor.

The Court: A permanent injunction against what?

Mr. Merrigan: Against the removal of these people from their positions. We also ask the Court to grant a declaratory judgment that the contracts which are being maintained at the base are illegal.

The Court: Very well. Thank you.

Mr. Zimmerman.

Mr. Zimmerman: May it please the Court, counsel has not advised the Court that there are some 200 or 300 appeals pending before the Civil Service Commission from these reduction in force actions and that there is before the Court, as Government Exhibit No. 2, an affidavit by the Chairman of the Civil Service Commission advising that they are entertaining these appeals, that they will rule

upon the questions, and that we have moved and suggested to the Court, rather, that they have failed to exhaust their administrative remedies, that equity jurisdiction is totally lacking here.

The Court: But while these appeals are pending before the Civil Service Commission will the severance from
32 employment go into effect?

Mr. Zimmerman: Certainly, as in every ordinary employee case, as Your Honor is very well familiar, as in *Beard v. Stahr*, where the officer was to be separated and the Supreme Court, when the case came up from the order entered—

The Court: In other words, the appeal to the Civil Service Commission—

Mr. Zimmerman: Is a post—

The Court: —does not temporarily stay the separation, does it?

Mr. Zimmerman: That is correct, Your Honor, but they have an adequate and plain remedy. Congress has provided that if the Court ultimately orders reinstatement because of violation of law, that they shall receive full back pay and allowances.

The Court: I don't think that is an adequate remedy for a person who has a wife and children and who has to pay rent and grocery bills from month to month.

Mr. Zimmerman: This is true in every employee discharge case, Your Honor, and I have never known this Court to depart from the rule—I am speaking of Your

Honor—that where the remedy is adequate, and I
33 suggest that the Courts have heretofore not held that the fact the employee must get himself another job where he claims his removal is illegal, is a factor that the Court weighs at the time when someone comes in before they have exhausted their administrative remedies.

Now, I would like to further suggest to this Court that the leading decision in this Circuit, *Young v. Higly*, which we cite in a memorandum, and I will give you the citation

in a moment, Your Honor, holds that they must exhaust their administrative remedies and the Court does not have jurisdiction otherwise.

The Court: Of course they have to exhaust their administrative remedies before they can get relief by way of final judgment. I don't think that deprives the Court of the right to issue a preliminary injunction to maintain the status quo.

Mr. Zimmerman: I concede that, Your Honor, except that I add, to what Your Honor has stated, that where they cannot show that the remedy at law is inadequate—and we differ very strongly with Your Honor's statement, if I may be permitted to do so—

The Court: Of course. That is often counsel's function.

34 Mr. Zimmerman: —that the separation, followed by post-separation remedies, is not an adequate remedy in an employee discharge case, here a separation under reduction in force. The cases are legion in this circuit on separation.

May I also add this, Your Honor, we have filed an affidavit by the Administrative official most familiar with the matter in NASA, indicating that there is no violation of the Civil Service Commission opinion, that they are working to see to it that the defects which the Commission's General Counsel found at another space center—the opinion referred to—is worked out in all NASA installations so that the Civil Service Commission and the Administrator combined will see eye to eye on future operations.

Now, Your Honor, I should like to—

The Court: I would like to ask you this, is counsel for the plaintiff correct in his statements of facts that a lot of functions at this particular station and other stations of this agency are performed by employees who are not government employees but who are furnished by contract? Is that a correct statement of facts?

Mr. Zimmerman: That is a correct statement of fact. There is work done under a contract research and de-

35 velopment authorization by Congress, both on-site and off-site by contractor personnel.

The Court: I can understand contracting out research work, say, at a college laboratory, you wouldn't have to hire Civil Service employees. But here is a government agency in a government building, I am astounded that instead of hiring employees under the Civil Service and other acts, it makes a contract with a contractor to furnish the services and he brings in his own employees. Isn't that a violation of the Civil Service law on its very face?

Mr. Zimmerman: Not necessarily, Your Honor.

The opinion of the General Counsel, to which counsel has adverted, does not say that all such contracts are illegal, and any implication by counsel that this is the purport of that opinion is incorrect.

I should like, if Your Honor desires to pursue this point, refer to that opinion and indicate the circumstances under which the General Counsel said it might be unlawful.

The Court: I would be glad to have you do so. I don't want to interfere with your train of thought or presentation, but sometimes during the course of your argument I would like to have you discuss the opinion of the General

36 Counsel, and not only that, but the general legality of the idea of hiring employees by contract with a contractor instead of hiring individual employees.

Mr. Zimmerman: I am happy to approach this problem from any angle Your Honor desires, so I will follow the angle that most interests Your Honor.

The Court: No, I would like to have you present it in your own way.

Mr. Zimmerman: I choose to address myself to the things that interest Your Honor.

The Court: Very well.

Mr. Zimmerman: For example, Your Honor, GSA, General Services Administration, has architects on duty, the Federal Aviation Administration may have architects on

duty, but if they wish to get done a great Government building or wish to get done a great airport, like Dulles Airport, and know that they want leading architects in the country, they will contract out to purchase the services of an architectural and engineering firm employing this great architect.

And as Your Honor also well knows, there are so-called think factories, corporations around the country which perform services with computers and things of that nature.

37 And if Your Honor will recall, when Sputnik went up into the outer space a direction was given to NASA that they need get a man on the moon by 1970, so that all of the great technological abilities of the United States had to be harnessed to do the job and not simply to do it by means of an increase of Civil Service employees. So that the research and development funds, Your Honor, of NASA were employed to contract out these functions, in part.

And I should like to, after I go over the opinion of the General Counsel, to refer to the affidavit filed by the NASA official indicating wherein they draw the line and are endeavoring to draw the line at the present time.

If Your Honor—

The Court: I have no doubt that, of course, when special services are required to perform a specific task it is proper for the Government to have the work done by contract; but unless the picture drawn by plaintiffs' counsel is erroneous—

Mr. Zimmerman: Which it is, Your Honor.

The Court: —as I understand it, a great deal of the routine work at the Center is done by these contractor employees instead of Civil Service employees.

38 Mr. Zimmerman: That is being eliminated where it occurs, and the NASA affidavit indicates that in any instance where they find side-by-side employment they plan to correct it and eliminate it, Your Honor.

The Court: I know, but how long is that going to take?
 Mr. Zimmerman: It is not going to take very long, Your Honor.

And furthermore, the Civil Service Commission, on the individual appeals of these plaintiffs, the individual plaintiffs in this law suit and any others subject to the reduction in force, will look into the facts and to the extent that their reduction in force may be contrary to law on the record made before the Civil Service Commission, will arrive at the proper determination.

Certainly, Your Honor, the Court is not to be burdened with some 640 or 1,000 individual cases when an agency exists with primary responsibility to establish these very facts in an administrative proceeding, and it is exactly what is to occur under this situation with respect to the Civil Service Commission and the Commissioner head of the Civil Service Commission has so stated in his affidavit.

But let me address myself to what seemed to be
 39 of great interest to Your Honor, the opinion of the General Counsel of the Civil Service Commission.
 At page 40 of his—

The Court: I would say that even without that opinion such a plan of operating a Government department is illegal.

Mr. Zimmerman: I think Your Honor ought to reserve Your Honor's judgment on that point until Your Honor has heard me out fully.

The Court: That is only my tentative reaction, Mr. Zimmerman.

Mr. Zimmerman: I trust it is very tentative, Your Honor.

At page 40 of the Civil Service Commission General Counsel's opinion he sums up the elements in a particular contractual situation which in his judgment, and I stress the judgment of the General Counsel, would tend to indicate that you no longer have an independent contractor arrangement but, rather, an employer-employee or master-

servant relationship, and he lists these items, none of which he indicates are necessarily exclusively controlling but have to be judged in the totality of all the facts, just as in
 40 a tort case, as Your Honor well knows, to determine whether there is an independent contractor at work or an employee you must look at all the facts.

"Performance on-site"—Does Your Honor see that at page 40?

The Court: Yes.

Mr. Zimmerman:

"Principal tools and equipment furnished by the Government.

"Services are applied directly to integral effort of agencies or an organizational subpart in furtherance of assigned function or mission.

"Comparable services, meeting comparable needs, are performed in the same or similar agencies using Civil Service personnel.

"The need for the type of service provided can reasonably be expected to last beyond one year.

"The inherent nature of the service, or the manner in which it is provided reasonably requires directly or indirectly, Government direction or supervision of contractor employees in order to adequately protect the Government's interest or to retain control of the function involved,
 41 or to retain full personal responsibility for the function supported in a duly authorized Federal officer of employee.

"Applying these standards, the contracts under review"—which were the two contracts at another Space Center which are under specific review—"and all like them are proscribed unless an agency possesses a specific exception."

So, on the facts of those particular contracts the General Counsel said look at the totality of the case, looking at the totality of the case these violated the independent contractor situation and became an employer-employee situation.

Now as Your Honor is well aware, Government doesn't always speak on questions of law, on questions of policy, with one voice. Government has many functions to perform.

In this instance there is an area, a gray area of difference between NASA and the Civil Service Commission, to speak frankly. That is being reconciled and worked out.

I should like to bring to the Court's attention a statement by James Webb, the Administrator of NASA, in a hearing before the Committee on Aeronautical and Space

Sciences of the United States Senate, 90th Congress, 42 on November 8, 1967, connected with NASA's proposed operating plan for fiscal year 1968. One of

the Senators, or perhaps it was one of the staff, asked Mr. Webb to comment, to state NASA's position relative to the recent decision by the Civil Service Commission—we are talking about the General Counsel's opinion—that certain NASA personnel contract procedures are illegal and result in the procurement of personnel in violation of the requirements and policies of the personnel laws as administered by the Commission. Mr. Webb replied as follows, We have had discussions with the Civil Service Commission, we have looked at several drafts of that opinion, and I go on to quote his words:

"We have tried very hard to find ways to have both the Civil Service Commission and the General Accounting Office work with us to develop forms of contracts that they would not feel impelled to criticize."

I might interject at this point, Your Honor, that as I stated, the Civil Service Commission opinion does not direct or hold that all contract arrangements are illegal, as Your Honor was inclined to think pursuant to the argument plaintiffs' counsel made.

43 The Court: Naturally, there are many contracts that are perfectly legal.

If the Architect of the Capitol wishes to make a contract with a consultant for a specific job, that is an entirely dif-

ferent proposition from the performance of day-to-day functions of the department.

Mr. Zimmerman: That is a large word, Your Honor, day-to-day—

The Court: For example, I don't suppose you would say that the Department of Justice would have a right to make a contract with some concern to operate its file room and fire all file clerks and have the contractor bring in its own employees to operate the file room. That would be a clear violation of law.

Mr. Zimmerman: May I give you another illustration, Your Honor.

Supposing he has an excellent group of technicians and engineers building an excellent booster engine to lift off something from the earth and into the atomsphere, and the directive from Congress in a statute for NASA says there shall not be unnecessary duplication of work and that all

44 the resources of the United States shall be brought to bear upon the problem, and NASA determines that it is in the national interest that not only should the Government be knowledgeable in this but that the industrial base and the scientific base in the universities should also be knowledgeable about this matter and determines that a cooperative effort is best in this situation and hires GE to work on that booster engine at the same time that NASA personnel are supervising to be sure that they are not wasting the Government's money; and assume further that NASA is working on a different stage of the same matter, so that the one is working on one project and the Government laboratory is working on another and a laboratory at a university is working on another, but that the result is all to be tied together.

Would Your Honor then say that this violates the Civil Service laws?

Would Congress have contemplated, in setting up research and development funds, in knowing that NASA is doing this very thing through the years, would Congress

say, as Your Honor is inclined to think pursuant to counsel's argument, that this violates the Civil Service laws?

There is a job to be done by NASA in this instance. NASA has the responsibility. The Civil Service laws,

45 NASA's directives, which I will cover in a moment, both must be reconciled within reason considering the mission assigned.

The Court: Isn't the difference between doing a special temporary job requiring special skill which can be done by contract, and day-to-day operations of a Government agency?

Certainly the day-to-day operations of a Government agency could not be contracted out.

Mr. Zimmerman: I don't know whether they can or can't if we understand each other on what day-to-day operations are of an agency like NASA. What does Your Honor mean by the day-to-day operations?

Day-to-day operations of NASA is to build the hardware and the equipment to take manned and unmanned space vehicles into orbit and to get the astronauts back to earth, and this in the shortest possible time, Your Honor.

Now what Congress and the Executive determine is wise in this area, I should suggest that the courts, as Your Honor has often stated, citing *DeCatur v. Paulding*, that sometimes mischief can be accomplished by interjecting the courts in an area where they ought not to be, in terms of policy, judgment, and so forth.

46 Now coming back to Mr. Webb's statement, he said, We are working with the Civil Service Commission and working with the General Accounting Office to put the house in order.

I suggest in this connection, Your Honor, it would be well for the Court in this present posture of the matter to let it be worked out within the Executive Department, which are quite concerned over the problem, have been working at it, and an attempt is being made to work it out properly.

The Court: I am strongly in sympathy with the view that you suggest. I don't think it is the function of the Court to work this thing out, certainly not until the three Government agencies involved finish their task.

The only thing that I have to determine this morning is whether the Government should be required to keep these several hundred people in their jobs until this is worked out.

Mr. Zimmerman: And if you do it for these several hundred, Your Honor, which is 560 and others subject to reduction in force, a total of 1,000, NASA's affidavit says as to these 560 if the Court were to direct that they be retained on duty it would carry a price tag of five million dollars per year, which NASA has determined, first,
47 that what they are doing by and large here is legal, would necessitate—

The Court: It should not take a year, however, for the three agencies to work this thing out.

Mr. Zimmerman: If Your Honor please, whatever it takes, the affidavit of NASA says that Congress has directed an immediate cut-back in the funds of NASA. The President on top of that has directed them to cut back further. They are under the gun of directives from Congress and the President that they must get reduced to an operable level.

The Court: Well, of course, I would not interfere, I would not issue a preliminary injunction against reduction of contract employees.

Mr. Zimmerman: If Your Honor please, there is a reduction in contract employees at Marshall going into effect.

The Court: I said I would not enjoin that.

The only question is whether I should enjoin a reduction of Civil Service employees temporarily until this matter can be worked out.

Mr. Zimmerman: Well, may I suggest this, Your Honor: the Civil Service employees are working under a
48 personnel budget, the contract employees are working under a research and development budget. There

is a difference in authorizations respecting whence comes the funds as to paying both.

I merely suggest this, that if in total it turns out that the action of NASA is largely proper and that only a few people involved in this reduction in force are in a side-by-side situation, NASA is going to quickly try to get them back on the job themselves.

The Civil Service Commission has stated in its decision that it is processing the appeals right now and they will do what is necessary.

So as of the moment Your Honor is considering the possibility, which rather shocks me, of keeping on duty across the board some 560 employees without even knowing whether any of these people or how many of them would fall into the category of the kind of situation that Your Honor adverts to and are not in the kind of situation to which I advert, which is where, for example, GE people are working on part of a booster and NASA people are working on a different part, and those people under Your Honor's own view would not be entitled to be kept on, as opposed to the contractor employee.

49 I should like at this point to refer to the statement of the NASA view, although I haven't yet finished Mr. Webb's statement to Congress. The NASA affidavit states that when they took over responsibility for the nation's space effort at the arsenal in Huntsville there were both contract employees working for the Army and Civil Service employees. Both greatly increased in size during the time that NASA was expanding its responsibilities for the space effort. In fiscal year 1964 there were some 7,321 Civil Service employees at the Huntsville facility and there was an estimated 6,421 contractor employees engaged in various things in relation to the Huntsville facility. I can't know from this affidavit whether they were on-site or off-site and in what degree each occurred and how many were highly specialized people whom you couldn't get in a Government Civil Service position.

In 1965, the affidavit continues, the work responsibilities of the Marshall Space Flight Center began to level off because the program at Marshall was nearing completion. Since 1966 the work there has been declining. Both the Civil Service complement and the contractor support staffing have showed a steady decline. So, both have been declining in number.

50 The Civil Service employees as of the close of the current fiscal year is projected to be 6,386. So there will be, Your Honor, some 6,000 Civil Service employees there.

The support service contractor employees are to be reduced approximately 1,000 and they have reduced some 400 support service contractor personnel within the past seven months.

The Court: I don't know what you mean by support services. That is a term with which I am not familiar.

Mr. Zimmerman: It is a term with which I am not familiar either, Your Honor.

I am advised that this includes all personnel, whether working on-site or off-site, helping to do the job of NASA, who are paid from research and development funds, not from personnel appropriation funds, and are the contractor support.

The Court: It seems to me there is a difference between the status of an employee who is working in a Government building and an employee who is working for a Government contractor on a contractor's own premises to do a specific job.

51 Mr. Zimmerman: I would suggest that the on-site or off-site status of the matter should not necessarily be decisive. If you have got a big job to do it may be more economical to move a complement from GE down to Huntsville, rather than to have to communicate by long distance, when you have to have close supervision by your Civil Service employees.

The Court: Suppose we take our mid-morning recess at this time and let you continue after the recess.

(Recess.)

The Court: You may proceed, Mr. Zimmerman.

Mr. Zimmerman: I was speaking, as of the time of the recess, relative to the affidavit we have filed on behalf of NASA in this case.

The affidavit sets forth that the appropriations of NASA are divided into three parts, research and development, construction of facilities, and administrative operations.

The administrative operations appropriation is what Civil Service employees' pay comes out of, the research and development appropriation is what the contractor funds come out of.

I am advised by NASA that even at the present time if these employees are kept on they will subsequently necessarily, because of the limitations placed upon the personnel budget of NASA to pay Civil Service employees, an even larger reduction in force will be required.

The Court: Mr. Zimmerman, I have a vague idea, I am not sure whether I am right, that there is some general provision of law permitting Government agencies to transfer a certain percentage of appropriations from one item to another; is there not such a provision?

Mr. Zimmerman: I think most appropriations have such a provision. I think NASA has an allowance up to five percent, but this is subject to control, if Your Honor please, by the Bureau of the Budget within Government.

The Court: I know, but the Bureau of the Budget can allow the transfer; that is within the Executive Department.

Mr. Zimmerman: And Congress has a say in the matter. For example, you must go back to Congress for continuing on in a deficiency situation.

The Court: I was a career man with the Government for a great many years and we had deficiency appropria-

tions every year. Generally we started with the first appropriations bill, then a second, sometimes this ran into a third and fourth. That is part of the routine.

53 Mr. Zimmerman: Except that in the present economy situation, Your Honor, it may be a serious matter for either the President or the Congress to authorize additional appropriations where there have been direction and agreement, with a possible tax increase involved, in terms of not authorizing additional funds.

As a matter of fact, NASA is caught between two stones, actually, the falling off of the work and the economy directive both from Congress and the President, and I humbly suggest to this Court that these are considerations best left to be worked out within the Executive Department and the Congress.

But returning—

The Court: You know, Mr. Zimmerman, I used to notice over the years—and I was a career man with the Government for almost 21 years—a temporary agency would be established or a new bureau in a permanent agency, and a very able person from private life would be brought in to head it and he, quite naturally, got to chafe under the Civil Service regulations and the regulations as to advertising for bids for contracts, and so on, because he was not confronted with all those limitations in private life, and sometimes it does interfere with efficiency, but

54 you know, the wisdom of the years is with the Government system. I think it is that that has kept the Federal Service on such a high level. You find less waste, less inefficiency, less favoritism, in Federal Service than you do in private industry and you find that the average Government permanent career employee is more efficient and more dedicated than his corresponding number in private industry.

Mr. Zimmerman: Your Honor, the problem before us has to do with an existing situation where there had to be a rapid build-up in ability and potential of NASA

to do the job assigned it. They have created an organization which has done a magnificent job.

The Court: No question about that. I think we have nothing but praise for the marvelous achievements of that agency.

Mr. Zimmerman: And I might suggest that if there were a corporation in which Professor Einstein and Mr. Fermi and Professor Lawrence were working and they were the top-notch men in a particular field of necessity needed in the space effort, and the only way to procure their services would be by a contract-out arrangement, I would suggest that it might be in the best interests of
55 the United States to hire their services by such a contract-out arrangement.

The Court: The Court is in full accord with you, but the Court infers from Mr. Merrigan's argument that a great many of these employees are routine employees performing routine work.

Mr. Zimmerman: That is not accurate, Your Honor, in this sense: none of the people concerned here are guards. Because of the arrangement down at Huntsville, practically the entire complement, I think the entire complement, I will take the word "practically" out, of guards, are hired out, like the Brinks guards arrangement, whereby they perform the guard services.

This is not the crux of this matter. We are talking mainly, as I understand it, of specialists, technicians, engineers, people of this nature.

The Court: The 500 employees who are involved in this application this morning are not all specialists, are they? Many of them are routine employees?

Mr. Zimmerman: That I don't know, Your Honor, and I don't know the extent to which any of them are working side-by-side with contractor employees in terms of a mission. NASA has endeavored—

56 The Court: Shouldn't we find out before we fire them?

Mr. Zimmerman: If Your Honor please, NASA is under an injunction, in effect, from the President and the Congress, to get within a certain operating level.

We have to, in this instance, to determine, and if Your Honor keeps jurisdiction and if Your Honor assumes to go into these facts, the validity of each contract, the scope of the employees involved; we would be interminably taking evidence. It would be in the interest of the plaintiffs—

The Court: This is clearly something I would not do, Mr. Zimmerman.

What I have in mind, and I would like to have you comment on this possibility, I have been rather turning over tentatively the possible idea of issuing a preliminary injunction or a temporary injunction staying the discharge of any employee having a permanent Civil Service status until he exhausts his administrative remedy.

Now the Civil Service Commission would just have to work fast.

Mr. Zimmerman: May I suggest—

The Court: There is no reason why they shouldn't
57 work as fast as the courts do. This Court works fast.

Mr. Zimmerman: May I suggest to Your Honor in that connection that if Your Honor would choose to do it as to 500, then whenever an individual comes in who also makes an appealing claim that he will be out of a job, that his family would be without food, then he too—

The Court: The unusual situation here is this, that apparently there is an overtone of disagreement between the Civil Service Commission and the General Accounting Office on one hand and the head of the agency on the other, as to the question of handling employees, as to what work can be contracted out and what work must be done by Civil Service employees.

Now the Civil Service Commission is a permanent agency that has been in existence since the 1880's and they are well versed in these personnel matters. The General

Accounting Office has been in existence for half a century or so.

I think they have had since October to work this situation out. They ought to be able to work it out promptly.

I am just wondering whether it would not be fair to
 58 restrain these separation, because of this situation,
 because of this peculiar situation as to whether or
 not there is a violation of the Civil Service laws, until
 the exhaustion of administrative remedies.

Now the Court fully appreciates the urgency of your argument as to the desirability of economy, but that can be promoted by expeditious work on the part of the Civil Service Commission and the General Accounting Office.

Mr. Zimmerman: What Your Honor is suggesting is that irrespective of what may be the ultimate resolution of this law suit, irrespective that many of these people may be not entitled to continue in the Government job upon final resolution, that they should nevertheless be kept on the Government payroll—

The Court: I am referring only to those of the 500-odd employees who have a permanent Civil Service status. Now, of course, that would not prevent anybody from being removed on charges or anything of that sort.

Mr. Zimmerman: That is not involved in this litigation.

The Court: No, of course that is not involved.

If some of these 500 employees are temporary employees,
 I wouldn't—

59 Mr. Zimmerman: I don't believe so.

The Court: If they have a permanent Civil Service status, in view of the, shall we call it negotiations going on between the Civil Service Commission and NASA, until the exhaustion of administrative remedies I think perhaps it would be fair not to chop their heads off in the meantime.

Mr. Zimmerman: May I suggest this to Your Honor: Your Honor is contemplating continuing these employees in jobs, with the Government being obliged to pay a salary,

the Government of the United States, not these defendants. I suggest to Your Honor that in respect of making the United States pay these people, whether their continuation in employment is legal or illegal as ultimately determined, is in truth an unconsented suit, because it comes out of the treasury of the United States.

Now Judge Magruder made this suggestion in a concurring opinion in a case in the First Circuit in which the Court, the whole Court, ruled that the exhaustion doctrine barred maintenance of the action, *Fitzpatrick v. Snyder*—

The Court: What did you say the Court ruled?

Mr. Zimmerman: That the exhaustion doctrine
60 barred maintenance of the action.

Judge Magruder also said that he thought that making the United States liable to pay salaries plus benefits when it may ultimately be determined that the Government is not legally bound to pay it out of the public treasury, really amounts to an unconsented suit against the United States.

We urge that point here for whatever Your Honor thinks of the matter of the ultimate merits. It is quite probable, in my opinion, that a goodly measure of the contracts will be sustained as perfectly lawful. If Your Honor would like to hear me on that point now, I will be happy to address myself to it.

The Court: I will be glad to hear anything you wish to present to the Court. This is an important matter.

Mr. Zimmerman: I should like to pursue the fact that Mr. Webb, advising Congress as to its proposed operating plan for the current year, indicated that he had met with Mr. Macy, that they were working out the matter, and that if NASA were required to employ all these people on the NASA payroll it would almost double NASA employment, that is, if it had to take all contractor employees and put them on the NASA payroll it would double the
61 payroll, and that it would be practically impossible to get all the competencies required. "We are in the

middle of a flight test operation of about \$18 billion worth of work."

In his testimony on the 1968 NASA appropriation, Dr. Von Braun, who, as I am sure Your Honor is well aware, is the father of the large booster operation at Huntsville, testified before Congress on February 9, 1967, as appears in the hearings of the sub-committee, about the Marshall Center, and in it he said this:

"Since the Marshall Center was formed in 1960 we have used support contractors. There are, in essence, two reasons for this. Support contractors provide you with a certain flexibility in manpower management to take care of the unavoidable peaks and valleys as you go into a commitment such as Apollo and the landing of a man on the moon against a hard schedule; secondly, certain skills were simply not available in house. Our support contractor force increased between 1961 and 1964 as the complement of the Marshall Space Flight Center itself increased. In 1964, a peak year, we had a total of 39 contractors holding 77 support contracts in the Huntsville area."

And then they changed their plan and adopted a single support contractor, and he explained that this means that each of our laboratories and certain staff officers requiring help in their respective areas were authorized one contractor to provide this support; for example, Astrionics could go into competition and select one, and only one, contractor to support that entire laboratory. This, he said, made out a manageable scheme.

Now, I would like to address myself to the legal authority which concerns Your Honor.

Certainly Your Honor would agree, and I take it Your Honor has no difficulty, that even apart from statute, for some service of a particular nature, an end product like an architectural and engineering drawing from a laboratory or a piece of hardware, the Government contracts out. So there is no problem as to that.

If Your Honor will turn in the statute to Section 2451, 42 U. S. Code 2451, this is the objectives portion of the statute, sub-section (c), Your Honor, begins, "The aeronautical and space activities of the United States shall be conducted so as to contribute materially to one or more of the following objectives." And if Your Honor will
 63 look down to (5) Your Honor will see that one of the objectives is the preservation of the role of the United States as a leader in the aeronautical and space sciences and technology. I suggest when we speak about the United States there we are speaking of the NASA concept of the combination of governmental and industrial ability and competence.

Then if Your Honor will turn to (c)(8), in sub-division (8) Congress said the further objective is the most effective utilization of the scientific and engineering resources of the United States, and I humbly suggest to the Court that when we speak of the scientific and engineering resources we are not talking about that in-house for Government.

If Your Honor will turn to Section 2473, which is the section to which counsel for plaintiffs referred you, I should like to invite Your Honor's attention to the introductory words in sub-division (b), In the performance of its function the administration is authorized—and then jumping down—to appoint Civil Service employees. Now this is not a directive that all of the functions that NASA deems necessary to accomplish its mission must be done
 64 by Civil Service employees; it is a discretionary authorization to the Administrator to hire those employees that he deems essential to do his job and function.

Your Honor will turn in the same section (c)(5), the very same section talking about Government employees being hired. Is Your Honor with me?

The Court: Yes.

Mr. Zimmerman: Without regard to a certain limitation on contracts, irrelevant to this case:

"To enter into and to perform contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of its work, and on such terms as it may deem appropriate, with any Government agency and with any person, firm, association, corporation or educational institution."

If this umbrella of authority is not sufficient to justify at least the broad principle that a contract arrangement can be made when you want to hire GE to perform a particular job, Your Honor, then I have departed from reasoning and I am no longer able to read statutes, and I have had a long time reading statutes.

I submit to Your Honor that this is well and established authority to allow a contract arrangement.

65 Further, the very same section says:

"To the maximum extent practicable and consistent with the accomplishment of the purposes of this chapter"—

And I went over the purposes with Your Honor, which is to give all of the United States, its institutions of learning and its industrial capacity, to make such contracts, to allocate them in a manner which will enable small businesses to have and participate equitably in such contracts.

And it further says, and this is very important, to me, Your Honor, if Your Honor will read further in (5) you will see that, after it says it may use equipment, personnel and facilities of Federal and other agencies, it goes on to say that on a similar basis to cooperate with other public and private agencies and instrumentalities in the use of services, equipment and facilities.

Again, Your Honor, if I am—

The Court: Where are you reading from, Mr. Zimmerman?

Mr. Zimmerman: 2473 (b)(5).

The Court: Oh, yes.

66 Mr. Zimmerman: The contract provision, about the middle of it, you will find that the authorization is for the Administrator to make contracts and to use the services, equipment and facilities of private instrumentalities, as well as public instrumentalities.

And each year the Administrator has gone before Congress, has listed—and we have the appropriation reports here—what these contracts are.

The Defense Department has long had similar arrangements, when necessary, to get the hardware to do their job.

I would suggest to this Court that in the present economy operation, if Your Honor grants an injunction in relation to these individual plaintiffs, when the next reductions in force come in they will be before this Court seeking it on the authority of this. The total cost to government will be astronomical.

The Court: The only reason why I would be inclined to grant an injunction is because apparently there are negotiations in progress between the Civil Service Commission and NASA as to the question of correlation between contract and Civil Service employees.

I should have thought that NASA would have taken no action until those negotiations were concluded.

67 Mr. Zimmerman: I will tell you why NASA hasn't been able to wait, a note passed up to me this very moment, that if they have to keep these plaintiffs on the payroll a greater reduction in force will be required later to stay within budget limitations. This will injure other employees who would otherwise not be RIF'd. In other words—

The Court: I think NASA is entitled to expeditious action on the part of the Civil Service Commission, but it has been passing through my mind that NASA perhaps should have waited until the Civil Service Commission

had reached a conclusion or until the negotiations between the two agencies have reached a conclusion.

Mr. Zimmerman: NASA has stated in its affidavit that both its own evaluation is continuing and that if it turns out that any employees here are within the ban of whatever is finally worked out as not to be continued as a matter of policy, they will take corrective action.

But I suggest to Your Honor that the reason they are acting now is, as stated in the affidavit, their belief, as advised by Huntsville, there are none; and if there are any, there will be few in this category finally worked out.

68 So what Your Honor is contemplating is keeping a total of 560 on duty when ultimately it may be determined that one, two, three, five, or something like that may be entitled, in which event NASA plans to take corrective action of its own, and the Civil Service Commission has stated in its affidavit that it plans to take direct corrective action where required and the people will be made whole.

So, Your Honor, as a court of equity—and I must say, Your Honor, it is well established that this Court, sitting in equity, may refuse to intervene where to do so would work a public injury or be prejudicial to the public interest, and the protection of the public interest may validly be given precedence over the burdens which may accrue to individuals denied all interlocutory relief, and that was in connection with the emergency controls in World War II where Congress set up an emergency court and allowed no interlocutory relief whatsoever, and these people said we are being injured terribly and the Supreme Court said it is constitutional and lawful to deny individuals where a greater public interest will be served by allowing the governmental action not to be disturbed pending final resolution.

69 I stand before this Court and assure Your Honor that those entitled, under the final working out of

this as rapidly as the Civil Service Commission and NASA can work out the matter, will be put back on the job, if that is the proper judgment. If it is a matter of getting rid of support employees who are likewise not needed or shouldn't be had, they will be gotten rid of.

So that the economy objective which the President and the Congress have now said is paramount, Your Honor, I can't conceive that Your Honor chooses to place the authority of the Court athwart the Executives's and the Congress' determination that ahead of everything else today in this country we must have an economical operation of Government; and for Your Honor to be considering allowing some 500 to stay on duty when it may turn out that very few of them are qualified for the result that Your Honor considers, and the agencies stand ready to assure Your Honor that they will take the corrective action as soon as possible, I think that equity—and I know Your Honor's sense of equity is strong—ought not to intervene in the present posture of the matter.

And on this note I should like to say if Your Honor has any other problem with respect to any of this, I should be glad to address myself to it. If Your Honor doesn't have any, I should simply want to correct certain erroneous statements made as to the facts.

First, it is not correct that NASA is hiring any employees in the place of these RIF'd persons. That is not true. The contractor employees are themselves being separated where necessary. And where further economies are needed, desirable, the employees not needed will be separated.

NASA has gone on record that these particular employees involved in this law suit are not needed.

As to the preference eligible, an incorrect statement was made as to who was a preference eligible.

The Court: Yes, I am not clear what a preference eligible is. I always thought that the words preference eligible referred to veterans preference.

Mr. Zimmerman: That is correct.

Counsel read only a portion of the definition. The portion to which he referred Your Honor, which was 5 U.S.C. 7511, talks about preference eligible employee means a permanent or indefinite preference eligible, but he passed over that word preference eligible. To find out what that

means you must look at 5 U.S.C. 2108, if Your Honor
71 will turn to it. It is in a different volume. I will be happy to pass my copy up (handing).

Now, a preference eligible is a veteran, a widow of a veteran, and certain other—

The Court: That was my impression too, but I didn't want to rely too much on my memory. I don't want to practice law by ear.

Mr. Zimmerman: But I am not meaning to inform Your Honor that a non-preference eligible may not have a permanent appointment. We both understand that.

The Court: Yes, I understand.

Mr. Zimmerman: If Your Honor will indulge me a moment.

The Court: Surely. Take whatever time you need, Mr. Zimmerman.

(Pause.)

Mr. Zimmerman: I should like to close with this observation, Your Honor: the matter is presently before the Civil Service Commission, it will make the necessary determinations. When their action is completed they will have a record, it will be possible if the person involved is aggrieved, to come before this Court on that record and have a review thereon. In the meantime, Your
72 Honor, if corrective action need be taken, it will be taken if NASA determines that that is called for under—

The Court: You know, I think it is very inconsiderate on the part of a Government department, any Government

department, to serve 500 notices of severance just before Christmas.

Mr. Zimmerman: I won't comment on that, Your Honor. All I suggest to Your Honor is that there are pressures—

The Court: Of course, I can't review that, but they certainly should have at least waited until after New Years or else have done it back in November. But to serve notices like that just on the eve of Christmas I think shows a certain callousness.

Mr. Zimmerman: There are pressures, as Your Honor knows from being in Government, that sometimes are unable not to be given effect to, and one of these at the moment is a forceful directive from both Congress and the President, in almost a state of national emergency, that everybody bring the Government's house in economical order at the earliest possible time.

The Court: Of course every citizen is heartily in favor of economy in Government, but you can't pick out
73 just one group of employees and urge economies as to them when there are other items, such as the Poverty Program, where there is no effort to economize.

Mr. Zimmerman: I didn't get the last part of Your Honor's statement, where there is what?

The Court: I said you can't pick out one group of employees, economize as to them, where there are other governmental activities, such as the various aspects of the Poverty Program, where there is no effort to really economize.

Mr. Zimmerman: I can't—

The Court: I am not passing judgment on other Government activities, but this idea of economy in reference to this group of employees just doesn't appeal to me.

Mr. Zimmerman: I can appreciate Your Honor's point of view; I have been in Government service a long time.

The Court: I know you have.

Mr. Zimmerman: And I feel that it is something to be certainly considered in relation to reducing Government

employees. At the same time, the present time is one where pressures are being exerted to bring Government within manageable proportions insofar as the directives from Congress and the President require it to be done. NASA is in the middle of that kind of a situation and I merely ask the indulgent understanding of the Court that the individuals who direct these actions have certainly a breadth of vision and concern. Also, there are sometimes things that must be done, as Your Honor knows—

The Court: I have no doubt as to the breadth of vision of the heads of NASA because they have done a marvelous job; but sometimes people with broad vision who are in charge, and successful charge, of vast enterprises, are not necessarily the best people to handle routine personnel matters.

Mr. Zimmerman: Except that the judgment made—and this is certainly within the Executive area—is that if they don't act as fast as they do there will be worse actions taken because they are under a directive that they must get within a certain limit, and that means further people, good people with more retention rights than these, will also be affected. This is the judgment which has to enter into it.

So, I merely suggest to Your Honor, as in *DeCatur v. Paulding*, this is an instance where the Executive Department does have the matter at hand, they are working on it, and it would be mischievous—and I submit this in all sincerity to the Court—for the Court to intervene in the present posture after it has received assurances that the Government agency concerned with employee matters is working on it, is understanding of it, is endeavoring to do the correct thing under the law, and so is NASA .

Thank you, Your Honor.

Mr. Merrigan: Your Honor, Mr. Zimmerman has stated several times during his argument that he represents

both NASA and the Civil Service Commission in this case, although I haven't heard him allude during his argument to any of the Civil Service Commission's interest in this matter.

I think the Commission's interest in this matter, if it were readily expressed, would be to give them the time. Their counsel has come down with an opinion in October saying that these contracts are proscribed by law.

The Court: I think the United States Attorney does not represent NASA, he does not represent the Civil Service Commission, he represents the United States.

Mr. Merrigan: Yes, he does, Your Honor.

To that extent—I mean I understand all this, but I really wish that during his argument at least at some point he would have given the Court the other side of the
76 coin when two Government agencies, as he pointed out, are in conflict with each other, the side of the Civil Service Commission and the side of the General Accounting Office.

Your Honor, just two brief comments. One is regarding this as being an action against the United States which would be barred by the sovereign immunity doctrine. Your Honor I am sure is aware that in *Dugan* against Rank the Supreme Court held that there were two real exceptions to that doctrine and one is where the action is against officers who are alleged to be exceeding their statutory powers, and we say that this case falls squarely within that exception set forth by the Supreme Court in *Dugan* against Rank, which the Court of Appeals for this Circuit recently referred to in *Postal Employees* against *Gronouski*, which was a case decided here just recently.

Also, Your Honor, on this business of preference eligible, I don't think counsel would want this Court to believe that these employees, all of them, aren't entitled to the preference retention rights set forth in 3502. The Civil Service Commission regulations which are also relied

on by the plaintiffs, at 5 C.F.R. 20.5(b) say this: no employee—

The Court: How many of them are preference
77 eligibles?

Mr. Merrigan: Your Honor, I would say in this group, I can't give you the exact number but there are veterans and there are non-veterans, all are permanent Civil Service employees—

The Court: I did not ask you how many are permanent Civil Service employees. I asked you how many are preference eligibles.

Mr. Merrigan: Your Honor, preference eligibles, if you adopt his definition of it—

The Court: I don't adopt his definition; I adopt the statutory definition, and I think your view as to what is a preference eligible is erroneous.

Mr. Merrigan: Well, Your Honor, conceding that for the moment, the applicable Civil Service Commission regulation is this: no employee—and it's prescribed pursuant to the statute—no employee, not preference eligible, no employee may be separated, furloughed, for more than thirty days, or reduced in pay in grade in a reduction in force, while a competing employee with lower retention standing or without retention priority based on a statutory retention right, is retained in the same competitive level.

78 And that is, I think, what the Civil Service Commission bases its opinion of its counsel on.

The Court: You don't successfully claim that that is being violated directly. Your contention is that they are retaining contract employees.

Mr. Merrigan: Who have no retention rights.

The Court: Well, they are not Government employees. I think this argument is a bit far-fetched.

Mr. Merrigan: Your Honor, with regard to what type of employees we are talking about here, I would direct Your Honor's attention to the affidavit which was filed in this case by one of the plaintiffs, Mr. Bronillette. That

affidavit at page 2, Your Honor, contains a photograph of Mr. Brouillette's office and I think it will show quite clearly that Mr. Brouillette's office at the Center is hardly an office in which they are building rockets or the General Electric people are performing some scientific duty.

The Court: I asked you this before but I did not quite get an adequate answer. What type of employees are these people, what do they do?

Mr. Merrigan: These employees who are being removed, Your Honor, go from the lowest possible, the machinist, the complaint alleges some of them are mechanics, 79 some of them are blue collar workers, that is, carpenters and the like, custodial employees.

The Court: By custodial employees you mean guards?

Mr. Merrigan: Guards have all been removed.

The Court: Or do you mean char women?

Mr. Merrigan: Warehousemen and clean-up people and so forth.

Also being removed, as the complaint shows, are computer operators, ladies who are Civil Service Employees working on a computer right next to the people employed by Computer Science Corporation and, by the way, under the same AO appropriation that counsel was talking about, working on the same computers.

So that when that lady is removed tomorrow her job on the computer will be taken over by the operator of the contractor; and that job, by the way, Your Honor, is being performed on three shifts today, so that there is enough work to make three shifts of work and yet that lady, with some twenty years or more of Civil Service rights, is being removed tomorrow while the contractor continues to work.

I referred Your Honor to this particular affidavit 80 because in the case of Brouillette, here he is, a specialist working in the mechanical engineering section at the Center. Here are five Civil Service employees working on one side of this little petition here. The partition

has a sign on it that says Hayes International Corporation Contractor Facility. On the other side of that are six non-Civil Service people.

The Court: Mr. Merrigan, I am going to ask you a question that perhaps interferes with your train of thought. How many of these people who have received notices have been able to get other jobs?

Mr. Merrigan: Your Honor—

The Court: Do you know?

Mr. Merrigan: No, I do not know, but I can say this, that this affidavit points out, for example, in this one situation where the people shown in that picture, of the employees shown in that picture before Your Honor, two will be RIF'd tomorrow, no employment at all; two whose desks are over to the right, no employment at all.

The Court: They have had these notices, I believe you said, since December 6th. Have they made any effort to get other jobs?

Mr. Merrigan: I am confident, Your Honor, they
81 are, but in most cases this will require, in order to get another job, the following: one, they will have to go to Florida to try to get work in some other facility that works for NASA, they would have to go to New Orleans, in some instances California. In fact, in this RIF where those employees are being reduced, they propose to remove them from Huntsville out to California, in some instances, or down to the Kennedy Center in Florida.

The Court: In other words, they are offering them jobs in other centers?

Mr. Merrigan: No, no, Your Honor. To the extent that some of the employees, the minority of the employees who are being reduced, in some instances are being sent to other facilities.

The Court: I think the Government has a right to do that. Private industry does it all the time.

Mr. Merrigan: Well, Your Honor, what we are talking about here, though, are employees who—

The Court: Of course it is inconvenient for a person to transplant his family, but that is part of modern life.

Mr. Merrigan: Well, it really isn't part of Civil Service modern life, Your Honor.

82 The Court: Oh, yes, it is. Civil Service employees are frequently moved and if they don't want to accept transfers their only alternative is to resign and get another position.

Mr. Merrigan: Well, I didn't say that they were being offered transfers in those cases, Your Honor. I said that in those cases where they are being discharged, in order to get other employment at all, in many, many of these instances, as the affidavits point out, they have to move from the Huntsville area to go look for employment elsewhere. That is what I am saying to Your Honor.

The Court: This plant is located in Huntsville, Alabama?

Mr. Merrigan: Yes, Your Honor.

The Court: How big a city is it, do you know?

Mr. Merrigan: It is a city that has grown some, Your Honor. I don't know the population.

The Court: Is it a one-industry town where it is difficult to get other employment?

Mr. Merrigan: I am sure that Huntsville was hardly known until the Redstone Arsenal and the NASA facility was put there.

The Court: Very well.

83 Mr. Merrigan: But, Your Honor, I would like also to just direct Your Honor's attention to this affidavit of Mr. Finger of NASA, to whom counsel referred several times. At pages 6 and 7 he admits in that affidavit that in some instances right now, during this reduction in force, the duties being performed by the contractor personnel are similar to those being performed by Civil Service personnel in the Center activities; that is, they could be interchanged.

The Court: I think you are re-arguing some of the matters you argued in your argument in chief. I think reply should be limited to reply.

Mr. Merrigan: Well, I am just replying, Your Honor, that in that affidavit itself it specifically sets forth that there are jobs that could be filled by Civil Service employees—

The Court: I think you are repeating now.

I do want to ask you one question, Mr. Zimmerman. I am not sure how relevant it is but it might affect the equities of the situation. Are any of these 560 employees being offered other positions in the agency, either at the same plant or elsewhere?

Mr. Zimmerman: I believe so, Your Honor. Let
84 me verify that. (Pause.)

The answer is yes, Your Honor.

The Court: What percentage?

Mr. Zimmerman: I will endeavor to find out. (Pause.)

There are new positions at Cape Kennedy required and there are other positions. The percentage of these we cannot inform the Court of at this moment.

Mr. Porter: Your Honor, I am Paul Porter. We have a motion to intervene in this matter.

The Court: I will decide the other motion first and then I will take this up.

Mr. Porter: Well, we would like to be heard.

Opinion of the Court

The Court: This Court has frequently had occasion to emphasize the well established doctrine, and to apply it vigorously, that the courts should not ordinarily interfere with the day-to-day operations of Government departments unless it is clear that some illegal act is being committed, and the courts then may intervene only to prevent the continuance of the illegal act.

In this case, however, there is a very unusual situation.

There are discussions, perhaps overtones of a
85 bona fide disagreement, between the employing agency and the Civil Service Commission, as to the extent to which the Government agency may cause its

activities to be performed under contract instead of by the Civil Service employees. Discussions apparently between the two agencies have been conducted since October and are now in process.

The Court is of the opinion that it is proper for the Court to grant a temporary injunction to restrain the separation from service of the employing agency of those employees who have a permanent Civil Service status, until these negotiations come to a conclusion or until administrative remedies are exhausted by the employees.

The Court is impressed by the force and the cogency of the argument of able counsel for the Government and the Court realizes the necessity of budgetary limitations under which the Government agencies are operating and the need for economy, but this can be minimized if the Civil Service Commission will promptly and expeditiously determine each of these cases. The Commission has been at this matter since October and I am unable to see any reason why they cannot all be disposed of within a few weeks' time.

Accordingly, the Court will grant a temporary injunction enjoining NASA from severing from employment
86 any of those persons who are represented by the plaintiff who have received notices of termination and who have a permanent Civil Service status, until their administrative remedies are exhausted or until the agencies involved in this case, that is, NASA and the Civil Service Commission, reach a definitive conclusion as to the extent to which Civil Service employees may be dispensed with in the performance of the functions of NASA.

If, however, any employee who will be protected by the injunction should use dilatory tactics or interpose any delays in the exhaustion of administrative remedies, the Court will, on application, vacate the injunction as to him.

Mr. Zimmerman: If Your Honor will indulge me a moment I would like to consult and then speak relative to certain aspects of this.

The Court: Surely.

(Pause.)

Mr. Zimmerman: First, for purposes of clarifying our understanding of Your Honor's ruling, do we understand that if the Civil Service Commission and NASA reach an agreement relative to the scope of reconciliation
87 between contractor workers and Civil Service workers, that immediately upon that occurring we may apply for vacating of this preliminary injunction?

The Court: Yes, indeed.

Mr. Zimmerman: Secondly, on the other part of Your Honor's directive, the Civil Service Commission has a hearing level and a initial decision and then an appeal will lie to the Commission itself. May we at the level, assuming that the matter reaches that stage in any individual instance of these 500 before this other occurs of an agreement between NASA and the Civil Service Commission on the total picture, may we then come in in that individual case upon the initial decision?

The Court: Yes.

Mr. Zimmerman: Fine.

I should like your indulgence further to again consult with respect to security for bond and approach Your Honor once more.

The Court: Surely.

Mr. Merrigan: Your Honor, could I ask one question regarding the last mentioned point?

The remedy which we are talking about is an appeal, first, to the Atlantic—

88 The Court: I have ruled on that.

When you have won the case the thing to do is to keep still.

Mr. Merrigan: All right.

(Pause.)

The Court: Perhaps you gentlemen would like to have a little time for this discussion and you can come back after the luncheon recess. Would you rather do that?

Mr. Zimmerman: At least two points I would like to straighten out right now, Your Honor.

The Court: Very well.

Mr. Zimmerman: Number one, we should like to ask for a stay pending appeal.

The Court: That is the one thing I won't do because the agency is about to fire those men tomorrow.

Mr. Zimmerman: Fine.

The Court: A stay pending appeal would nullify my injunction, unless they agree not to discharge these people.

Mr. Zimmerman: Until the Court of Appeals acts.

The Court: Yes.

Mr. Zimmerman: I will inquire and see if we can work that out.

89 Secondly, Your Honor, under Rule 65 security is required. Under our view practically all of these employees will not be able to establish a case ultimately. We, therefore, are faced with a formidable problem of fixing security.

As we would assess it and as we maintained earlier, this is really against the treasury of the United States, not the individual defendants. The Government of the United States will be obliged to pay unnecessary salaries, it would be our view, I mean our view of the matter. So that we would off-handedly suggest that on an annual rate of five million, whatever proportion of time it takes that Your Honor believes is reasonable for this all to take place—

The Court: What bond do you suggest?

Mr. Zimmerman: I should like to consult and come back to the Court as to the precise amount, if I may have that opportunity after lunch.

The Court: Yes, surely.

Mr. Porter, you had a motion.

Mr. Zimmerman: May I have the Court's indulgence one moment longer?

Mr. Porter: Your Honor, I do not desire to take any more time. We have a motion to intervene in this
90 proceeding, representing the National Council of Technical Service Industries.

Mr. Zimmerman: May I interrupt a moment, Mr. Porter?

The Court: Is there any opposition to the motion for leave to intervene?

Mr. Zimmerman: There will be from us, Your Honor.

The Court: Why?

Mr. Zimmerman: Do you wish to hear me at this point?

The Court: Well, then perhaps—Does the plaintiff oppose this motion?

Mr. Merrigan: Yes, we do oppose, Your Honor. We were served yesterday.

The Court: I think I will hear you after lunch. I thought perhaps there would be no opposition to the motion to intervene.

Mr. Porter: I didn't anticipate that, Your Honor.

Mr. Merrigan: We don't oppose Mr. Porter, we oppose the motion.

The Court: Of course we try to be liberal in granting such an application, but I will hear the opposition. I think we better take that up after the luncheon recess.

91 Mr. Zimmerman: The point I want to make clear to Your Honor, we maintain that the Union as such has no standing in this law suit, as Your Honor recently ruled in one instance of an incorporated association.

The Court: I can rule that this is a class suit, Mr. Zimmerman.

Mr. Zimmerman: I am in agreement, it is a class suit as to the individuals. So that we would like it understood, if Your Honor will so rule, that Your Honor's ruling is in behalf of the individual plaintiffs and their class.

The Court: As a class.

There is no question as to that, is there, Mr. Merrigan?

Mr. Zimmerman: But not the Union.

Mr. Merrigan: I don't want to disagree in any way with my friend or the Court, but the Union in this case has a collective bargaining agreement which specifically states, Your Honor, that all reductions in force will be conducted in strict compliance with law, and we say that that breaches the contract.

The Court: Of course, collective bargaining agreements are new in Government.

92 Mr. Zimmerman: Our Court of Appeals has ruled on that in two cases, Your Honor.

The Court: What has it held?

Mr. Zimmerman: It has ruled that the collective bargaining agreements, in Executive Order 17988, create no litigable rights in court, and we have the citation.

The Court: I don't sit here to overrule the Court of Appeals; I will follow the Court of Appeals.

Mr. Zimmerman: Our friend differs as to the reading of those cases. We will be glad to cite them and Your Honor to consider them.

The Court: Very well. We will take the rest of these matters up after the luncheon recess.

(At 12:30 p.m. the hearing stood in recess, to reconvene 1:45 p.m.)

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AFTERNOON SESSION

The Court: Mr. Zimmerman.

Mr. Zimmerman: Does Your Honor wish to consider the matter of intervention first?

The Court: Yes. You wanted to raise the question of a bond, did you not?

Mr. Zimmerman: Do you wish me to settle that first?

The Court: It is immaterial to the Court.

Mr. Merrigan: Your Honor, I would suggest we proceed with the bond before we go to the intervention.

Mr. Zimmerman: Before I address myself to the question of bond, in order to arrive at the figure of 560 there were reduction in force procedures followed. We believe it will be enormously complicated to undo what has been done up to this point and we would suggest to the Court that under its order the status quo as it is today, in other words as of the day that the 560 is to go into effect, be what the Court maintains by its order, if that is agreeable with counsel, if I make my point clear.

Mr. Merrigan: You don't to me, Mr. Zimmerman.

Mr. Zimmerman: The point we make is that Your Honor's order should read that the status quo as it is
94 today should remain in effect; we don't have to go and undo the reduction in force procedures of people who have already retired and all of that.

The Court: No, no.

Mr. Zimmerman: Is that understood, Mr. Merrigan?

The Court: I am just staying the orders from taking effect, that is all.

Mr. Merrigan: As of tomorrow, as I understand.

Mr. Zimmerman: As of tomorrow, that is right. We understand each other. Fine.

Now as to the bond, Your Honor—

The Court: I am wondering whether any sizable bond would be appropriate here.

Mr. Zimmerman: We believe it would be, for this reason: if we are correct, the treasury of the United States will suffer a cost which would be in an amount, and we have had it ascertained from Huntsville, of \$187,365 on a bi-weekly basis. It is our judgment that there will be very few people legally entitled to remain on duty.

The Court: There is a practicable problem there, Mr. Zimmerman, that the Court cannot ignore. Suppose, for example, the Government collects on the bond. That money
95 wouldn't go back to NASA, that money would be covered into the treasury and it couldn't be used until it is reappropriated.

Mr. Zimmerman: I understand that, Your Honor, but the situation here is, the treasury of the United States would be paying out salary money which it is not properly or legally required to do.

The Court: But the Government would be getting work in return.

Mr. Zimmerman: No, the work has been determined to be not needed. Somebody has got to go as far as the work situation.

The Court: We don't generally require a substantial bond in injunctions against the Government that I recall.

Mr. Zimmerman: We don't normally have the situation of the Court doing what Your Honor is doing in this instance.

The Court: I am not going to undo with my left hand what I did with my right, because if I impose such a bond as that I might as well vacate my injunction.

Mr. Zimmerman: We understand Your Honor's problem. As an advocate for the United States I suggest that if the United States is to be kept whole in this matter
96 we calculate that we would need a bond in the amount running, say, 90 days, of about a million dollars. We understand Your Honor's feeling that that is an impractical amount to ask. We merely suggest that this is the amount that would be needed if we were to be made whole.

The Court: As a matter of fact, I don't see any reason why it should take 90 days for the Civil Service Commission to resolve all these cases.

Mr. Zimmerman: I have gone over that with them, Your Honor, and this is the situation: they are entitled to file their appeal, which some of them have done; they are entitled to a hearing on that appeal, and I asked the Civil Service officers whether or not that can be expedited, and they have got to get the information from the individuals, get the information from NASA, and then set up hearings for these individuals.

The Court: It is about time that administrative agencies learned to decide cases expeditiously as the courts do.

Mr. Zimmerman: What would Your Honor estimate as a reasonable period?

The Court: What bond do you suggest, Mr. Merrigan?

Mr. Merrigan: Your Honor, Mr. Zimmerman keeps
97 speaking of this suit as though—

The Court: What bond do you suggest?

Mr. Merrigan: A nominal bond, because the defendants are Federal officials, three of whom are the Civil Service

Commissioners, could suffer no damage whatever.

The Court: I am inclined to fix a small bond. What nominal bond do you suggest?

Mr. Merrigan: I would really leave that to Your Honor's discretion.

The Court: Do you have any suggestion?

Mr. Zimmerman: In view of our position, Your Honor, I would prefer not making a suggestion.

The Court: I will fix a \$1,000 bond.

Now I will hear Mr. Porter's motion.

Mr. Porter: Thank you.

If Your Honor please, I represent what has been alluded to here in these proceedings this morning as the National Council of Technical Service Industries. These are composed of a number of members, all of whom have these contracts at the Huntsville Space Center involved here.

The Court: They are employees of these contractors?

Mr. Porter: They are the employees of these
98 contractors.

I would just briefly review, if Your Honor please, the membership of this association. There is the Avco Corporation, Bendix Corporation, Computer Sciences Corporation—and these are annexed to our pleadings—Computing and Software, Incorporated, Ford Motor Company, International Telephone and Telegraph Corporation, Kay and Associates, Litton Industries, Manpower, Incorporated, Northrop Corporation, Radiation, Incorporated, Radio Corporation of America, and Unitec Corporation.

If Your Honor please, if the effect of your ruling this morning was to cast some legal doubt or taint upon the contracts that these members have—

The Court: Perhaps that isn't quite accurate. It is to maintain the status quo until any doubt whatever there may or may not be is resolved.

Mr. Porter: Yes, but, if Your Honor please, it is my understanding that it was the position of the plaintiff here that the reason was that there were competitive posi-

tions or slots, as I think they are called, of the employees of these contractors with those of the—

The Court: I can see where your clients have an interest, that is, where the employees have an interest.

99 I have a little question in my mind as to whether the Council as an organization has an interest.

Mr. Porter: Your Honor, we have addressed ourself to that in our memorandum here and our authorities that begin on page 11 of our memorandum I think make it quite clear that in the *National Motor Freight Assn. v. United States*, 372 U.S. 246, we think that clearly holds that an association, if they are not adequately represented—and Your Honor I think made it clear this morning that there has been some dispute between the Civil Service Commission and NASA as to, perhaps, the legality of these contracts; hence, we believe that we have an intervention under 24(a), perhaps as a matter of right, and we believe that the authorities—

The Court: I think the individuals whom the Council represents have an interest, I have no doubt about that, and if they wanted to intervene as a class I don't think there would be too much difficulty. The question I have in mind is whether the Council as an organization—

Mr. Porter: May I address myself to that point, if Your Honor please, because we are appearing here in a representative capacity.

If I might, I would like to go back and review very briefly what our position is with respect to the
100 underlying policy that is involved here. Going back as early as 1959, the Executive Office of the President, Bureau of the Budget, issued a bulletin called 60-2, which is in the record of hearings before Your Honor, which emphasized the underlying purpose of contracting out, and I would read the policy statement of that, if I may:

“It is the general policy of the Administration that the Federal Government will not start or carry on any commercial industrial activity to provide a service

or product for its own use if such product or service can be procured from private enterprise through ordinary business channels."

That is the case here, Your Honor.

Subsequently, in A-76—that was under President Eisenhower's directive—this was revised, updated and replaced, but the same policy and the same policy statements was there underlined.

If Your Honor please, I think the dimensions of this contracting out are important and relevant to the issues before you and why we wish to be here and we desire—

The Court: I have no doubt you have a right to be heard. Do you want to intervene or do you want
101 to be heard as *amicus curiae*?

Mr. Porter: We want to be heard as a party.

If I might conclude, Your Honor, with the observation that what is basic here is the most efficient manpower utilization.

I am completely in sympathy with Your Honor's statement this morning of the solicitude for the Civil Service and the fine work that they can do and are doing, but the policy that was enunciated by President Eisenhower and repeated by President Johnson in the revision of this Order was that in this time of emergency, of the special crash projects such as space, defense, that there should not be built insofar as possible a permanent Civil Service establishment, that these jobs should be terminated when the emergency is passed.

The dimensions of this, I am informed there are about \$4 billion involved in the Defense budget and the NASA budget of these substantial companies who have devoted their resources—they have contract employees managing the early warning service in the Arctic, they are on aircraft carriers, they are shoulder to shoulder in Viet Nam managing sophisticated—

The Court: I am not quite clear what this
102 National Council is. Is it a council of employees or of—

Mr. Porter: Of the companies, the corporations, of the contractors.

The Court: I see. It is like a trade association.

Mr. Porter: It is like a trade association, precisely. It was organized for the purpose of attempting to place in one group those who have participated in mobilizing all the manpower and technical resources that would speak with one voice.

This matter, if Your Honor please, is not new, this conflict that Your Honor put his finger on this morning between the Civil Service and the Defense Department and the agencies has been going on since the Fujii decision in Japan of an Air Force base there in 1965, and that Fujii opinion has been escalated by the Civil Service, by the employees unions, which would exclude in substantial part the type of activities that are before Your Honor here today.

Now if the effect of your decision is that the support contract at Huntsville is an unlawful undertaking, this casts in doubt a substantial part of very important defense and space activities and it is for that reason that we feel we have a definite specific interest here, to protect
103 and defend the legality of some \$4 billion of essential activity that these companies have been performing over a period of many years.

The Court: Is there any opposition to this application?

Mr. Zimmerman: On the very point that Your Honor addressed your remarks, we in the Government believe that the would-be intervenor, as an association, has no standing as such, whatever be the rights of its individual component concerns and the interest they have.

I will address myself to that question at length and am prepared to do it and I have the authorities, Your Honor, and have read the material that they have filed in support of their intervention application, and we think the authorities they cite do not sustain them.

I should also like to point out that the scope of the Civil Service Commission decision, in its General Counsel's

statement, they did not attempt to judge the legality or illegality of any particular contracts, rights of contractors or the rights of the Government versus them. It is not yet settled at this stage in this law suit that that is a critical question which will be decisive in the litigation, nor do I understand that Your Honor is stopping
 104 the Government action is wishing in this law suit to litigate that question.

The Court: No.

Mr. Zimmerman: It will be done in the individual law suits that are filed after exhaustion, if I understand Your Honor correctly.

The Court: All I wanted to do was to maintain the status quo until either the Civil Service Commission and NASA reach an agreement on these matters or until the employees exhaust their administrative remedies.

Mr. Zimmerman: And I would then suggest—

The Court: And I intimate no views, because in fact I have none, as to the legality of the arrangement.

Mr. Zimmerman: And I therefore suggest that the premises the intervenors wish to come into the law suit are not present here; and if that does arise, if the Commission makes a ruling thereon, they then may come in in the appropriate law suit and protect their interest.

The Court: How would the Government be prejudiced by allowing the intervention?

Mr. Zimmerman: On the basis that we say neither the union nor the contractor organization have standing. We do not wish to have the individual rights, the facts
 105 of those cases complicated by general positions taken—

The Court: The petition for intervention is, in effect, a trade association. Trade associations have been allowed as parties in matters of interest to their members, have they not?

Mr. Zimmerman: In instances where Congress has provided, by statute, that interested parties who are recognized

before the agency may come in. That was the situation in a case they rely on, National Motor Freight Association. Judge Burger's opinion in the same case, which the Supreme Court reversed per curiam, sets out the existing law on this proposition and, we believe, correctly.

The Court: You say it was reversed by the Supreme Court?

Mr. Zimmerman: Yes, Your Honor.

The Court: Then according to the Supreme Court it doesn't set forth—

Mr. Zimmerman: No, Your Honor misunderstands my statement. Judge Burger sets out the law correctly where there is no special statutory provision for standing. The Supreme Court reversed, saying that there was a special statutory provision here.

The Court: I see.

106 Mr. Zimmerman: Now in this instance, in our case, there is no special statutory provision.

The Court: What did Judge Burger hold?

Mr. Zimmerman: Judge Burger held that normally organizations are not recognized as having standing when you are litigating individual rights that are not directly their own, that the individual members may come into court and litigate and if they are fully capable of litigating it they are the proper persons to come into court.

So that in this instance it would be the concern whose contract is affected at Marshall, if that be a question that the Court is going to rule upon ultimately, who would have intervenor interests and rights and to preserve—

The Court: I don't see what harm would accrue to the Government by allowing intervention.

Mr. Zimmerman: We are not suggesting that the Government's interest will not be protected. We are suggesting to the Court that, like most other things of procedure, proper steps should be taken and what the would-be intervenor should do is to have the proper companies come in.

We are merely advising the Court, in a sort of amicus situation, as far as we are concerned, that it would be

improper for the association to come in on its own.
 107 Now with respect to the union, we have already made that assertion as to them and we feel we would be in an inconsistent position in this law suit not to bring to Your Honor's attention that we say neither the union nor they have a right to be in.

The Court: Well, the union is here, I haven't dismissed the case as to the union, although I think there is much to be said in support of your position that the union does not have standing to sue; but I think the Council would have the same rights, such as they may be, as the union would.

Mr. Zimmerman: And we say they are both in non-right positions.

In addition, Your Honor, so I won't mislead the Court, the union is asserting a right under the agreement reached pursuant to Executive Order 10988, which is not a factor involved with the intervenor.

The Court: You called attention to a decision of the Court of Appeals to the effect that collective bargaining agreements in the Government do not have the same effect as collective bargaining agreements with private industry. I recall that decision. I don't have before me a motion to dismiss the union, so I don't have to
 108 decide their status.

Mr. Zimmerman: We made a suggestion, Your Honor, in opposition, but I agree with Your Honor that we now need to go forward with the motion.

As of this moment I would advise the Court that it would appear to us that if Your Honor isn't intending to go forward to any final decision and merely to hold in abeyance, it seems a fruitless gesture on our part, so I don't think we will probably file a motion.

The Court: The Court agrees with you.
 Do you wish to be heard on this?

Mr. Merrigan: Just very briefly, Your Honor.

My feeling about the Council is just this: First, Your Honor, under Rule 24(a), intervention of right, they show

no such right. There is no statute that authorizes their intervention.

The Court: Why are you opposed to it?

Mr. Merrigan: Your Honor, I would have a different position regarding individual contractors coming in because they have contract rights to protect.

This Council has a group of companies in here, most of whom are not involved in any way in this law suit. For example, I was looking over the list of members—

109 The Court: My question to you is, why do you object? I am not interested in your legal reasons for objecting, I am interested in the real reason why you try to find some legal reasons for objecting.

Mr. Merrigan: Well, I was trying to really lead up to that, Your Honor.

The Court: No, start with it.

Mr. Merrigan: Well, I will start over.

The Court: In other words, how are you prejudiced? I should think you would welcome someone who wants to be heard and you would take the position, Sure, if he wants to be heard let him be heard.

Mr. Merrigan: I would welcome the individual contractors who say they have a contract right to protect.

This Council, Your Honor, is not, in my judgment, a bona fide trade association. I think this Council is a representative here in Washington of this group to present arguments in their support before Congress. I don't think it is a party who should be in this litigation. Most of their members, if Your Honor look at their papers, are not involved in this case directly or indirectly, only one or two of them really are.

I would say to Your Honor that under Rule 24, 110 which is really the Bible, so to speak, on this, one, they have no intervention of right—

The Court: Rule 24 is one of those rules that must be liberally construed.

I am going to allow the intervention. I don't see how either the plaintiff or the defendant is going to be preju-

diced by the intervention. They do have interests to protect.

Mr. Merrigan: Thank you, Your Honor.

Mr. Zimmerman: We left one item unfinished, Your Honor. Before lunch Your Honor will recall we suggested that the injunction should run in favor of the individual plaintiffs and their class and we didn't think it should run in favor of the union, whose rights are not involved.

The Court: That is right.

Mr. Zimmerman: And you were going to ask and you were about to ask counsel what his thoughts were on that and we never finished.

The Court: I am inclined to think that the injunction should not run in favor of the union because there is grave doubt as yet as to what the status of a union of Government employees is before the Government.

111 I am willing to recognize this as a class suit with the individual plaintiffs as representatives of the class and have the injunction run in favor of the class.

Is that agreeable?

Mr. Merrigan: Yes, Your Honor, just so long as it is understood that you are not finally passing on the standing of the union.

The Court: Surely. But I can see the concern of Government counsel as to the union being accorded the status of getting an injunction. I think that is a matter of serious concern. So, I think we will solve it that way.

Now, I do want to add another limitation to the injunction which occurred to me as I pondered the matter over during the luncheon recess.

If NASA offers another position for which the employee is qualified and of corresponding pay, either at the same plant or at a different plant, and if it is at a different plant I presume the agency would pay moving expenses, under those circumstances as to such employees the injunction would be dissolved.

Now counsel will submit proposed findings of fact and a detailed order setting forth the terms of the injunction.

Mr. Zimmerman: If Your Honor will indulge me,
112 I should like to consult to find out whether there is anything else we wish to bring to your attention.

The Court: Surely. This is an important matter, take whatever time you need.

Mr. Porter: As a matter of clarification, Your Honor, did I understand my motion was granted?

The Court: Yes, your motion is granted.

Mr. Porter: Thank you, sir.

The Court: You may submit an order.

(Pause.)

Mr. Zimmerman: I believe, Your Honor, that all of the points that we have been discussing have been settled by Your Honor with one exception and we just wish to state that when the effective period runs for appeal in the Civil Service Commission on reduction in force and if it turns out that any are finally to be separated, that we do not have to give another 90-day reduction in force notice.

The Court: No, I made that clear, that I maintain the status quo by this injunction, and the minute the injunction terminates, the proceedings resume as of the status at which they are today.

Mr. Zimmerman: Exactly.

Now we will endeavor to work out the detail of
113 the order with counsel for both the plaintiffs and the intervenors. If we have problems we will, of course, be back before Your Honor.

The Court: Surely.

Mr. Zimmerman: Thank you.

The Court: Thank you, gentlemen.

(At 2:20 p.m. the hearing stood concluded.)

1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3261-67

LODGE 1858, AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, ET AL., *Plaintiffs,*

VERSUS

JAMES E. WEBB, ADMINISTRATOR, NATIONAL AERONAUTICS &
SPACE ADMINISTRATION, ET AL., *Defendants.*

January 15, 1968

Washington, D. C.

The above-entitled matter came on for hearing on motion before the HONORABLE ALEXANDER HOLTZOFF, A United States District Judge, at 10:30 A.M.

APPEARANCES:

For the plaintiffs:

EDWARD L. MERRIGAN, ESQUIRE.

For the defendants:

GIL ZIMMERMAN, ESQUIRE.

2

PROCEEDINGS:

The Deputy Clerk: The case of Lodge 1858, American Federation of Government Employees, et al. versus James D. Webb, Administrator, National Aeronautics & Space Administration, et al.

Mr. Zimmerman: May it please the Court—

The Court: The Court desires to make an observation, and this observation really should be considered a part of the statement that the Court made on the ruling on the motion. The only reason the Court granted a temporary injunction was because of the opinion from the Civil Service Commission, which has disapproved some of the personnel policies of the employing agency.

The Civil Service Commission is charged by law with enforcing and administering the laws regulating government personnel. In addition to that the Civil Service Commission is the President's agent, so to speak, or delegate in administering the government's personnel policies. The Civil Service Commission, in a sense, is the President's agent. Consequently, the Court felt that in issuing this injunction against NASA, it really was deciding this case in favor of the government, in favor of the agency that is charged with the administration of the Civil Service laws, and I felt the employing agency should have waited

3 until the Civil Service Commission had finished its investigation and final report.

I want to make it clear that this Court felt it was not interfering with the day-to-day operations of the government.

Now that is the reason why this injunction was granted, because this Court is firmly of the opinion that ordinarily the Court should not interfere with day-to-day operations of the government and this is emphatically so if interference is requested by way of temporary injunction, but this is obviously an exceptional situation.

I want to make it clear that that is what motivated me in granting this injunction.

Mr. Zimmerman: On behalf of the government I should like to state we surely appreciate Your Honor's remarks.

Your Honor directed that we appear this morning on a preliminary matter.

The Court: Well counsel for the plaintiffs seems to be concerned, and I can understand his concern, to some extent, while he, of course, did not doubt the word of the United States Attorney, he was wondering to what extent that commitment would be obeyed by the employing agency. I was sure it would be, but I can understand counsel's

concern.

4 Mr. Zimmerman: I have a draft here, Your Honor. I have worked on it with representatives of the Civil

Service Commission and NASA over the weekend. However, we need to advise Your Honor that it has not been finally accepted at the highest level of both the Civil Service Commission or NASA; nevertheless, pursuant to that instruction I am handing this up.

I should like to ask Your Honor's indulgence and the indulgence of counsel to permit me to coordinate its terms with the highest levels at the Civil Service Commission and NASA and appear again at two o'clock with our final version, if Your Honor will permit us to do that, and we will appreciate it very much.

The Court: Do you have any objection to that?

Mr. Merrigan: No, Your Honor.

The Court: Well, we will continue this until 1:45.

Mr. Zimmerman: We would appreciate that very much and we say thank you to the Court.

The Court: I suggest you do that.

Mr. Zimmerman: May I have Your Honor's indulgence for one moment?

Thank you, Your Honor. There is nothing further.

Mr. Merrigan: May I pass these up to the Court?

The Court: Suppose you maintain your papers also.

5 I would like each of you gentlemen to submit copies of the proposed documents that you propose to each other before two o'clock so each of you may be informed.

We will continue this until 1:45.

6 Afternoon Session

1:45 p.m.

The Deputy Clerk: Are there any preliminary matters?

The Court: Mr. Zimmerman.

Mr. Zimmerman: May it please the Court, I believe Mr. Merrigan is not present as yet. I suggest that our preliminary matter of this morning be continued until he appears.

The Court: Your opponent is not here?

We will wait a couple of minutes, because if I take up the next matter, I don't want to interrupt that.

Mr. Zimmerman: Yes, sir.

If your Honor please, would Your Honor like to have our set now or wait until Mr. Merrigan is present?

The Court: I think I would rather wait until he is present. But in the meantime, you may hand up your draft and I will examine it. It will save time.

(Short pause.)

The Court: Mr. Zimmerman, I have examined your proposed draft or your draft of a preliminary injunction, and I think it is fine. I will go over the proposed findings.

Mr. Zimmerman: Yes, sir.

(Mr. Merrigan enters.)

Mr. Merrigan: Your Honor, I very much apologize.

7 I thought it was two o'clock and not 1:45. I'm sorry.

The Court: I said 1:45, and when the marshal announced recess, he announced until 1:45.

Mr. Merrigan: I am terribly sorry, Your Honor. I wouldn't have had that happen for anything.

The Court: Mr. Zimmerman, in going over your proposed findings of fact, I am inclined to omit Finding No. 6. I don't think it's necessary and I don't want to pass judgment on that.

Mr. Zimmerman: I understand, Your Honor.

The Court: I will strike that out.

I am going to strike out Conclusion of Law No. 1. I don't think that is necessary.

Mr. Zimmerman: I understand, Your Honor.

The Court: And No. 2, I shall strike out the first two words, "However, most" and capitalize the word "Exception".

Mr. Zimmerman: Okay. I understand, Your Honor.

The Court: I think you prepared two excellent documents.

Now, Mr. Merrigan, the Court is of the opinion that both the proposed findings and the preliminary injunction as drafted by Government counsel, the United States
 8 Attorney, properly formulate the intention and ruling of the Court.

Now, is there any objection to any of them?

Mr. Merrigan: Your Honor, on the proposed findings, I have submitted our proposed findings, and I would like to direct Your Honor's attention to No. 3.

The Court: I am going to use the Government's proposed findings.

Mr. Merrigan: I understand, Your Honor. But there has been a statement by the Government that they intend to appeal this case. And if they do, could we not, Your Honor, include in these findings—I have redrafted these this morning to try to meet all of the Government's proposals with the exception of these. Could not the findings show that the plaintiffs specifically contend that the proposed—

The Court: No, I am not going to put contentions into findings. You can put that in your briefs.

Mr. Merrigan: Well, Your Honor, I would strongly urge that somewhere we show that we allege that the reduction would violate NASA's own statute.

The Court: That doesn't belong in the findings. The Court does not put counsel's arguments into the findings. You can put that in your briefs at the proper time.

Mr. Merrigan: Your Honor, I understood the Court
 9 to rule that if at any time the Government wanted to make an application for the dissolution of this injunction, that the Government would make application, not a simple notification to the Court, that they would apply to the Court, and, of course, the Court would hear the Government contention.

The Court: All applications have to be on notice. I am not going to put that in the order. They can't just come into chambers and ask to vacate the injunction. They wouldn't stay there very long if they did.

Mr. Merrigan: Would Your Honor put in the findings that the plaintiffs have alleged that they have an irreparable injury and that their damages exceed \$10,000?

The Court: No, I am not going to put into the findings what you allege or what you contend. That is not the proper function of findings. The findings of fact are supposed to state the facts on which the Court bases its conclusion.

Mr. Merrigan: Well, of course, Your Honor, I certainly understand these things. I am asking, too, about conclusions of law now.

The Court: It isn't customary to reply to the Court. The Court has ruled.

Mr. Merrigan: I understand, Your Honor.

10 On conclusions of law—

The Court: Yes.

Mr. Merrigan: Would it not be proper, Your Honor, for the conclusions of law to state that the Court has jurisdiction over the action, its jurisdiction over this action, should it not be stated in the conclusions?

The Court: No. As a matter of fact, all that is necessary is one conclusion of law: the plaintiff is entitled to an injunction.

Mr. Merrigan: If that is Your Honor's ruling, would Your Honor consider referring to any of the authorities that we have set forth?

The Court: I certainly don't cite authorities in findings of fact and conclusions of law.

Now, you know, when you win a case, the thing to do is to sit down and keep still.

Mr. Merrigan: Well, Your Honor, I do understand that.

The Court: And not to quarrel over semi-colons and semantics.

Mr. Merrigan: I didn't intend, Your Honor, any of those to be quarrels over that.

11 Your Honor, one thing I would ask Your Honor to consider is where in the injunction itself the Government refers to making an application for

the dissolution of the injunction, at the end of the first step of any administrative appeal, would Your Honor consider adding to the end of that particular provision "unless the case presents a substantial question of fact of law which merits exhausting the administrative remedy."

The Court: You can make that representation in an application to dissolve the injunction.

Mr. Merrigan: All right, Your Honor.

Your Honor, if I do understand the injunction to say then that the dissolution of this injunction in any case would be upon application and showing to the Court, I have no objection to the injunction in that form.

The Court: Very well.

Mr. Zimmerman, there is one thing that I possibly overlooked. I think the Federal Rules of Civil Procedure require a statement that the plaintiffs may be irreparably damaged.

Mr. Zimmerman: It is in there, Your Honor, the second complete paragraph on page 1.

The Court: Well, if you say it's there, that is enough for me.

12 Mr. Zimmerman: Your Honor, on page 2 of the order, there is a typographical error in the first paragraph, third line from the bottom. The first word "at" should read "of". If Your Honor would make that change, I would appreciate it. It would read "of the Marshall Space Flight Center."

The Court: Oh, yes.

Mr. Zimmerman: Thank you.

The Court: Thank you, gentlemen.

Mr. Merrigan: Thank you, Your Honor. And again I apologize for being late. That was highly unintentional, Your Honor.

The Court: That's perfectly all right. It's a misunderstanding. Misunderstandings often happen.

Mr. Merrigan: Thank you.

(Whereupon, at 2:08 p.m. the hearing was concluded.)

Findings of Fact and Conclusions of Law in Support of Preliminary Injunction

This cause having come before the Court January 11, 1968 for hearing on plaintiffs' motion for preliminary injunction, and defendants' opposition thereto; the Court having heard argument of counsel; the Court having considered the verified complaint, the affidavits filed in support of and in opposition to the motion, and the documentary, statutory and other material relied upon by counsel; and the Court now hereby makes the following Findings of Facts and Conclusions of Law in support of its issuance of a preliminary injunction in this cause.

FINDINGS OF FACT

1. Defendant James E. Webb, Administrator, National Aeronautics and Space Administration ("NASA"), scheduled reduction-in-force actions to take effect on January 13, 1968 at NASA's George C. Marshall Space Flight Center, located at the Army's Redstone Arsenal, Huntsville, Alabama. Approximately 560 permanent federal civil service employees were to be finally separated, and approximately 300 other permanent federal civil service employees were to be finally demoted, in these scheduled reduction-in-force actions.

2. The six individual plaintiffs in this action are among the approximately 860 permanent federal civil service employees of the Marshall Space Flight Center subject to these reduction-in-force actions. At the hearing on the motion for preliminary injunction, it was stipulated that these individual plaintiffs sue here in a representative capacity, on behalf of all other permanent civil service employees of the Marshall Space Flight Center subject to the reduction-in-force actions.

3. Plaintiffs contend in substance that the scheduled reduction-in-force actions violate their legal rights, and the legal rights of the class the individual plaintiffs represent

herein, under the reduction-in-force and other provisions in the civil service laws and regulations. All of the individual plaintiffs (except plaintiff Brouillette), and some 240 other permanent civil service employees in the class represented herein by the individual plaintiffs, have appeals pending before the Civil Service Commission from the reduction-in-force actions. The remaining individual plaintiff, and members of the class represented, have the right under 5 C.F.R. 351.901 to file appeals in their individual cases to the Commission not later than January 23, 1968, as if the reduction-in-force actions had taken effect as scheduled on January 13, 1968.

4. However, NASA and the Civil Service Commission are in the process of harmonizing NASA's operational needs and service contract policies of the Marshall Space Flight Center, with the legal requirements and Commission policies under the civil service laws. And NASA is itself in the process of evaluating the NASA operations at that Center, to insure that, in accord with established NASA personnel policy, no civil service employee is separated or reduced in grade or pay in the reduction-in-force actions while non-Government (contractor) personnel performing the same function continue to work on site at the Center under service contracts currently in effect with private contractors.

5. Marshall Space Flight Center management has determined that the 560 permanent civil service employees subject to separation under the reduction-in-force actions are not needed to carry on the present curtailed programs at that Center. However, a dispute remains between plaintiffs, on the one hand, and NASA, on the other, as to the retention rights of these permanent civil service employees vis-a-vis non-Government (contractor) personnel who continue to work on site at the Center under service contracts currently in effect with private contractors.

6. The reduction-in-force actions are a reflection of NASA appropriation reductions and program deletions, reductions and completions. The actions taken by NASA

at the Center represent NASA's best judgment in continuing those operations that are most urgently required to go forward, consistent with the congressional intent, the best interest of the nation's space program and the maintenance of the technological, industrial and Government base for present and future space efforts. However, as set forth in paragraph 4 above, NASA and the Civil Service Commission are in the process of harmonizing NASA's needs, etc., with the Commission's civil service policy views. [Deleted by Court]

7. NASA's Marshall Space Flight Center management, in cooperation with the Civil Service Commission, has established a positive out-placement program, the primary purpose of which is to place the employees at the Center who are subject to the reduction-in-force separations scheduled to take effect January 13, 1968 in positions elsewhere within the NASA organization.

8. The individual plaintiffs, and the class of permanent civil service employees of the Marshall Space Flight Center they represent, absent intervention by this Court, are confronted with reduction-in-force actions to be effective January 13, 1968, while there remain unresolved issues between NASA and the Civil Service Commission which may affect the retention rights of these employees.

CONCLUSIONS OF LAW

1. Personal economic and family hardships incident to separations from, or reductions in, federal civil service employment do not constitute cognizable irreparable injury warranting equity intervention prior to exhaustion of available administrative remedies. [Deleted by Court]

2. * * * Exceptional circumstances are present here, which warrant this Court, sitting in equity, to intervene to grant a preliminary injunction prior to exhaustion of administrative remedies while (a) NASA and the Civil Service Commission are in the process of harmonizing NASA's operational needs and service contract policies of the

Marshall Space Flight Center, with the legal requirements and Commission policies under the civil service laws; and (b) NASA is itself currently evaluating the continuing NASA contract operations of that Center in relation to the reduction-in-force actions.

3. The individual plaintiffs, and the class represented by them, are entitled to the preliminary injunction order to be entered by the Court. However, this Court, sitting in equity, must also consider dissolution of the preliminary injunction order in this litigation at the earliest possible time, relative to individual plaintiffs and members of the class they represent, where warranted pending exhaustion of administrative remedies, in the public interest.

/s/ ALEXANDER HOLTZOFF

United States District Judge

DATED: JANUARY 15, 1968

Preliminary Injunction

This cause having come before the Court on plaintiffs' motion for preliminary injunction, and defendants' opposition thereto; the Court having heard argument of counsel; and the Court having considered the verified complaint, the affidavits filed in support of and in opposition to the motion, and the documentary, statutory and other material relied upon by counsel;

It appearing to the Court, after due deliberation, that defendant James E. Webb, Administrator, National Aeronautics and Space Administration ("NASA"), will, unless preliminarily enjoined hereby, proceed with the reduction-in-force actions set forth below, to the irreparable injury of the individual plaintiffs and the class they represent herein (the permanent civil service employees of NASA's George C. Marshall Space Flight Center, Located at the Army's Redstone Arsenal, Huntsville, Alabama), if such reduction-in-force actions take final effect while NASA

and the Civil Service Commission are in the process of harmonizing NASA's operational needs and service contract policies at the Marshall Space Flight Center, with the legal requirements and Commission policies under the civil service laws.

And the Court having filed its Findings of Fact and Conclusions of Law,

IT IS BY THE COURT—

I. Ordered:

That defendant James E. Webb, the NASA Administrator, his officers, agents, employees, attorneys, and those persons acting in concert with them, be, and they hereby are, preliminarily enjoined from taking the reduction-in-force actions as to permanent civil service employees of Marshall Space Flight Center, scheduled to take effect on January 13, 1968, and are further enjoined to maintain the *status quo* prevailing as of January 12, 1968, in the cases of each of the individual plaintiffs and the class they represent herein (the permanent civil service employees of the Marshall Space Flight Center), pending further order of this Court, or, if thereafter necessary, pending final hearing and determination by this Court of this cause on the merits,

Except, However, that this preliminary injunction order shall not apply to any permanent civil service employees of the Marshall Space Flight Center within the class represented who—

(1) Resign, or reaffirm an earlier resignation, in writing after issuance of this preliminary injunction order; or

(2) File, or reaffirm an earlier application, for discontinued service annuity, in writing after issuance of this preliminary injunction order, and are found qualified to receive such discontinued service annuity.

Any such employees within (1) or (2) of this excepting clause, shall be entitled to receive such benefits as they

were, or would be, entitled to, had they been separated under reduction-in-force procedures.

And Provided, However, that this Court will immediately enter a further order dissolving this preliminary injunction as to particular named individual plaintiffs, and other named individual permanent civil service employees of the class represented, upon notification to the Court of any of the following occurrences:

(1) That NASA and the Civil Service Commission have reached agreement, and concur in the judgment that *prima facie* application of this agreement to the available facts in the individual employee cases, does not warrant continued maintenance of the *status quo* as of January 12, 1968 in respect of these named individual employees, pending exhaustion of administrative remedies; or

(2) That individual plaintiffs and members of the class represented failed to file on or before January 23, 1968 an administrative appeal to the Civil Service Commission from the NASA reduction-in-force action which would have taken effect in their individual cases on January 13, 1968, but for the issuance of this preliminary injunction order;
or

(3) That the initial decision by the Civil Service Regional Office on the appeals of the individual plaintiffs and members of the class represented, from the NASA reduction-in-force actions scheduled for January 13, 1968 has been adverse to their claims; or

(4) That the individual plaintiffs and members of the class represented have been notified in writing that they have not been diligently pursuing their appeals to the Commission, and failed within the period specified in such written notice to take such action as the Commission required for diligent prosecution of the appeals; or

(5) That the individual plaintiffs and members of the class represented were, after the date of issuance of this

preliminary injunction order, offered by NASA a reassignment to another permanent civil service position within NASA at the same grade and rate of pay, and with payment of moving expenses (if any), and declined to accept such reassignment.

II. And Further Ordered:

That further proceedings in this litigation be held in abeyance, pending further order of this Court, following upon exhaustion of administrative remedies by the individual plaintiffs and members of the class represented, and, if then aggrieved, their filing within a reasonable time thereafter of individual and separate actions for judicial review of the NASA reduction-in-force actions taken in their individual cases.

III. And Further Ordered:

That there be given on behalf of the individual plaintiffs and the class they represent herein (the permanent civil service employees at the Marshall Space Flight Center) a bond or other security in the sum of \$1,000.00, running to the named defendants (on behalf of the United States), for the payment of such costs and damages as may be incurred or suffered by the United States, if it is ultimately found that defendant James E. Webb, the NASA Administrator, his officers, etc., have been hereby wrongfully enjoined or restrained; and this preliminary injunction order shall take formal effect upon the approval and filing of such bond or other security with the Clerk of Court.

/s/ ALEXANDER HOLTZOFF
United States District Judge

Informally issued and put into effect the 11th day of January, 1968; formally dated and issued this 15 day of January, 1968.

Defendants' Opposition to Proposed Order Allowing Intervention of National Council of Technical Service Industries as Intervenor/Defendant

Defendants by their attorney, the United States Attorney, oppose the proposed order submitted by National Council of Technical Service Industries granting it leave to intervene as a defendant.

Annexed is our proposal form of intervention order which, we believe, should instead be entered. The transcript of the January 11, 1968 hearing shows (at pp. 103-104) that we tried to make the point that no interest of the would-be intervenor's principals will be adversely affected if the issue of the legality of the support service contracts complained of herein is not reached on the merits in this litigation. We think the Court essentially agreed with us.

Accordingly, to fully protect the Government's interests in this matter, we have drafted the annexed proposed order to make it clear that intervenor's interest will be involved in this lawsuit only if the legality of the support service contracts is reached on the merits in this action.

WHEREFORE, it is submitted, the Court should enter the intervention order in the form we propose.

/s/
David G. Bress
United States Attorney

/s/
Joseph M. Hannon
Assistant United States Attorney

/s/
Gil Zimmerman
Assistant United States Attorney

(Filed Feb 26 1968)

Order

This cause having come before the Court on January 11, 1968; a hearing having then been held on the motion of National Council of Technical Services Industries for leave to intervene as a defendant in this action; the Court having considered the arguments of counsel, the motion to intervene, and the papers annexed thereto; and the Court being sufficiently apprised in the premises,

It is by the Court this 23 day of February, 1968,

ORDERED:

That the motion of National Council of Technical Service Industries for leave to intervene as a party defendant under Rule 24, F.R.C.P., be, and hereby is, granted.

ALEXANDER HOLTZOFF
United States District Judge

Notice of Hearing on Motions

Edward L. Merrigan, Esquire
1700 Pennsylvania Avenue, N. W.
Washington, D. C.
Attorney for Plaintiffs

and

Paul A. Porter
Arnold and Porter
1229 Nineteenth Street, N. W.
Washington, D. C. 20036
Attorneys for Intervenor Defendant

PLEASE TAKE NOTICE that, in accordance with prior oral advices given you, counsel for Government defendants have arranged, with the approval of Chief Judge Edward M. Curran and Judge Alexander Holtzoff, to appear before

Judge Holtzoff, sitting as Judge of the United States District Court for the District of Columbia, at the United States Court House, Miami, Florida, on Thursday, March 7, 1968, at 10:00 a.m., or as soon thereafter as counsel can be heard, for hearing on Government defendants' motion to vacate preliminary injunction, and motion to dismiss, served herewith.

You are invited to attend, and present argument at the hearing in opposition.

In the event you do not oppose these motions, it is requested that you notify undersigned Government defendants' counsel in time to obviate the travel to Miami for this scheduled hearing.

/s/
David G. Bress
United States Attorney

/s/
Joseph M. Hannon
Assistant United States Attorney

/s/
Gil Zimmerman
Assistant United States Attorney

**Government Defendants' Motion To Vacate
Preliminary Injunction**

Government defendants by their attorney, the United States Attorney, move the Court to vacate the preliminary injunction entered in this action (informally) on January 11, 1968 and (formally) on January 15, 1968.

Dissolution of the preliminary injunction is hereby sought in accordance with Proviso (1) to the Preliminary Injunction, on the ground that its requirement has been met by

Agreement reached between the National Aeronautics and Space Administration ("NASA") and the Civil Service Commission ("CSC").

Incorporated into and made a part hereof, is the NASA-CSC Agreement in the matter, executed by the NASA Administrator and the CSC Chairman (annexed and marked Government Exhibit A).

We also annex hereto our proposed form of Order Vacating Preliminary Injunction. A memorandum of points and authorities is submitted herewith.

/s/ DAVID G. BRESS
United States Attorney

/s/ JOSEPH M. HANNON
Assistant United States Attorney

/s/ GIL ZIMMERMAN
Assistant United States Attorney

**Government Defendants' Memorandum of Points and
Authorities in Support of Motion To Vacate
Preliminary Injunction**

The terms of the Agreement (Government Ex. No. A) worked out between the National Aeronautics and Space Administration and the Civil Service Commission meet the requirements of Proviso (1) to the Preliminary Injunction entered (formally) on January 15, 1968. Since the agreement eliminates the essential basis¹ for the Court's intervention in this matter, the Court should promptly vacate the preliminary injunction.

We here incorporate by reference our prior memorandum in opposition, and the argument we made at the hearing on January 11, 1968.

¹ See hearing transcript (pp. 66, 85-87) and January 15, 1968 supplementary proceedings (pp. 2-3).

CONCLUSION

For the foregoing reasons, it is respectfully submitted, the Court should vacate the preliminary injunction.

/s/ DAVID G. BRESS
United States Attorney

/s/ JOSEPH M. HANNON
Assistant United States Attorney

/s/ GIL ZIMMERMAN
Assistant United States Attorney

NASA—CSC Agreement on the MSFC Reduction-in-Force

Whereas a preliminary injunction has been issued in Civil Action No. 3261-67, United States District Court for the District of Columbia, Lodge 1858, American Federation of Government Employees, Everett A. Brouillette, et al. v. James E. Webb, Administrator, National Aeronautics and Space Administration, John W. Macy, Jr., Chairman, U.S. Civil Service Commission, et al., and

Whereas under the order as issued said preliminary injunction will be dissolved when NASA and the Civil Service Commission reach agreement, and concur that prima facie application of such agreement to the available facts in the individual employee cases does not warrant continued maintenance of the status quo as of January 12, 1968, in respect of these named individual employees, pending exhaustion of administrative remedies; and

Whereas the National Aeronautics and Space Administration (NASA) and the United States Civil Service Commission (CSC) have reached agreement concerning broad principles to be applied in connection with the reduction-in-force at the George C. Marshall Space Flight Center which eliminates any probable involvement of improper service contract operations as they may affect that

reduction-in-force; now therefore, NASA and the CSC agree as follows:

1. That of the outstanding separation and reduction-in-grade notices as of January 12, 1968, which were 764, all but approximately 166 will be canceled. Of the 166 notices not canceled, approximately 56 will involve separation of employees and approximately 110 reductions in grade;
2. That approximately 150 of the wage board employees who received reduction-in-force notices are being retained by NASA and will be retrained for placement within Marshall Space Flight Center;
3. That the 69 technicians who have received separation notices will be offered reassignment elsewhere in NASA at the same grade and for comparable positions with the payment of moving expenses; and
4. That upon lifting of the injunction the reduction-in-force will proceed with respect to the notices remaining, and the employees involved will be accorded their full rights under reduction-in-force regulations.

NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION

By JAMES E. WEBB
James E. Webb
Administrator

Dated: 2/16/68

UNITED STATES CIVIL SERVICE
COMMISSION

By JOHN W. MACY, JR.
John W. Macy, Jr.
Chairman

Dated: 2/19/65

**Plaintiffs' Opposition to Defendants' Motion To Vacate
Preliminary Injunction**

When plaintiffs were first advised by General Counsel to defendant Civil Service Commission that NASA and the Commission had reached an agreement which NASA had led the Commission to believe would

(i) cancel the proposed Reduction-in-Force in each and every individual case where there was even a "*probable* involvement of improper service contract operations" and as a result,

(ii) the pending RIF notices would be completely cancelled in 598 out of the original 764 RIF cases, and that

(iii) only 56 employees would thus be separated and only 110 would be reduced in grade, *none of whom had any involvement whatsoever "in improper service contract operations"*; and finally that

(iv) the 6 individual plaintiffs to this action would definitely be among the 598 employees whose RIF notices would be cancelled,

plaintiff's counsel replied in substance that plaintiff would stipulate to vacate the preliminary injunction, as suggested by the defendants herein, if NASA promptly supplied a list setting forth the names and employment positions of the 764 employees involved and showed that, *in actual application and performance of the NASA-CSC Agreement by NASA*, the final results would be as represented by NASA to the Commission.

This same request was made by plaintiff's counsel to Assistant U.S. Attorney Zimmerman.

Thereafter, on February 27, 1968, plaintiff's counsel received from Mr. Zimmerman—

1. A letter signed by Mr. Hannon, dated February 27, 1968 (*Exhibit A* hereto),

2. A copy of a letter dated February 27, 1968 from the Deputy General Counsel of NASA to Mr. Zimmerman (*Exhibit B* hereto); and

3. Copies of two lists NASA had supplied to reflect *how it* intends to administer and apply the NASA-CSC Agreement in each individual case if the preliminary injunction is completely vacated by the Court (*Exhibit C* hereto).

Those lists supplied by NASA showed that, *contrary to the aforesaid representations of General Counsel for the Civil Service Commission and contrary to his stated understanding of the intended effect of the NASA-CSC Agreement—*

(a) 5 of the 6 plaintiffs to this action are still tagged by NASA for separation, demotion or involuntary transfer;¹

(b) the 6th plaintiff is not even included on the list; and

(c) numerous other Civil Service employees at the Marshall Center, who are clearly involved in "improper contract operations", are still among the 56 employees scheduled by NASA for separation and the 110 scheduled for demotion.

Counsel for plaintiff immediately brought these facts to the attention of General Counsel for the Civil Service Commission. The General Counsel stated that "he was shocked and surprised" that NASA would attempt so to administer and apply the Agreement it had reached with the Commission. He stated it was the Commission's clear understanding that NASA intended to bend over backwards to make sure that the RIF of any employee involved in even a

¹ Plaintiffs Campbell and Gunter are still scheduled for separation; plaintiffs Brouillette and Roden are to be demoted several grades; and plaintiff Easter has been involuntarily moved by NASA to the Navy Department.

"doubtful improper service contract operation" (i.e. "interface") would be cancelled; and that the 6 plaintiffs, whose cases were apparently fairly representative of the 598 illegal RIF's which were to be cancelled, would surely be protected under the Agreement. The General Counsel to the Commission stated he would try to see what he could do to rectify the situation.

It was at this point that counsel for plaintiffs also advised Assistant U.S. Attorney Zimmerman that plaintiffs thus could not consent to appear before Judge Holtzoff in Miami, Florida for hearing on defendants' motion to vacate the preliminary injunction. Mr. Zimmerman was advised that *because NASA was proposing to violate the sense and intent of the Agreement in plaintiffs' cases and in several other individual cases*, plaintiffs deemed it absolutely essential, in the interests of justice, to call defendant John Macy, a party to this action and Chairman of the Civil Service Commission and a signatory of the said NASA-CSC Agreement, and the Commission's General Counsel to testify at the hearing on the pending motion to vacate regarding the propriety of NASA's proposed application of the Agreement in the aforesaid individual cases. Both Mr. Macy and the Commission's General Counsel are here in the District of Columbia and could not be compelled to testify in Florida. Hence, plaintiffs' insistence upon a hearing before the Court here in the District of Columbia.

Plaintiffs thereupon suggested that the hearing on the motion to vacate be postponed until Judge Holtzoff returns to the District of Columbia, or in the alternative, that the hearing be held now before any other Judge of the District Court here in Washington. Defendants' counsel refused; and of course, the Court has now unfortunately ruled that it will act on this motion in Miami, Florida without benefit of any hearing, argument or testimony at all. These developments place plaintiffs and the class they represent in grave danger of falling victim to NASA's

preconceived plan to violate its own Agreement with the Civil Service Commission and thus to defeat and frustrate the lawful rights of the 166 Civil Service employees who will be separated or demoted from their positions as soon as this Court vacates the preliminary injunction. It also means that unless the Court grants the relief now sought by plaintiffs, the Court will give its stamp of approval to NASA's outrageous attempt to single out and punish the plaintiffs for bringing this action.

In view of these circumstances and because of the wholly unjust and unfortunate predicament they present for the plaintiffs and the other employees involved, we thus urge the Court, *in line with Proviso (1) of the Preliminary Injunction* itself, temporarily to limit its ruling on defendants' motion to vacate the preliminary injunction as follows (i.e. until Judge Holtzoff returns to the District of Columbia and is thus able to conduct an appropriate hearing on the matters still in honest dispute under the NASA-CSC Agreement):

(i) The injunction should not be vacated at this time as to the 56 employees NASA proposes to separate from their positions until the Civil Service Commission has investigated the facts and certificates to the Court *in each individual case* that, at the time the employee received his RIF notice from NASA, he was not involved in any "improper contract operation" as specified in the NASA-CSC Agreement; and

(ii) The injunction should not be vacated at this time as to the 110 employees NASA proposes to demote until the Civil Service Commission likewise certifies to the Court that, at the time the employee in each case received his RIF notice, he was not involved in an "improper contract operation" as specified in the NASA-CSC Agreement and

(iii) The injunction should not be vacated at this time as to the 6 individual plaintiffs, who had the

courage to bring this suit and who are now being unjustly discriminated against by NASA as a means of penalty or retribution, until the Civil Service Commission likewise certifies to the Court that each plaintiff, at the time he received a RIF notice, was not involved in an "improper contract operation" as specified in the NASA-CSC Agreement.

These limitations are certainly justified by and clearly in line with the terms and conditions of the Preliminary Injunction itself. In this regard, Judge Holtzoff provided in the said Injunction, at pages 2, 3:

"And Provided, However, that this Court will immediately enter a further order dissolving this preliminary injunction as to particular named plaintiffs and other named individual permanent civil service employees of the class represented, upon notification to the Court of any of the following occurrences:

(1) *That NASA and the Civil Service Commission have reached agreement, and concur in the judgment that prima facie application of this agreement to the available facts in the individual employee cases, does not warrant continued maintenance of the status quo as of January 12, 1968 in respect of these named individual employees, pending exhaustion of Administrative remedies."* (Emphasis Added)

Patently, the Court in logic did not intend that the Injunction should be dissolved simply because NASA and the Civil Service Commission reached a brief, general, overall, unspecific agreement. On the contrary, the Injunction itself indicates that it is to be dissolved as to individual plaintiffs and individual employees only when NASA and the Civil Service Commission are able to "concur"—

"That prima facie application of this Agreement to the available facts in the individual employee cases, does not warrant continued maintenance of the status quo . . ."

Accordingly, we submit that it would be the height of injustice in this case to vacate the Injunction—especially as to the 6 individual plaintiffs and the 56 employees destined for final separation—before the Civil Service Commission is asked specifically to certify that, under its Agreement with NASA and the facts of each case, each such employee, when proposed for separation from his position, was not tainted by an “improper service contract operation” as contemplated by the NASA-CSC Agreement itself.

The extent of this injustice would be compounded many times over if this result is reached without the benefit of hearing and at a time when the Agreement between NASA and the Commission itself candidly admits on its face that out of the original 764 proposed separations and demotions, 598 admittedly were absolutely precluded as a matter of law by “improper service contract operations”.

Furthermore, while NASA has been proceeding post-haste to take advantage of the 6 courageous individual plaintiffs in this case and unlawfully to sacrifice 56 other good, loyal, faultless civil service employees allegedly under its agreement with the Civil Service Commission, the Commission itself has been standing idly by and has failed so far to render a single decision *even at the regional level* in any individual, administrative appeal under the Civil Service Act.

Wherefore, plaintiffs urge the Court to deny defendants’ motion to vacate the preliminary injunction in the following respects:

(1) That the motion to vacate should be denied as to the 56 employees NASA proposes to discharge until the Civil Service Commission, as provided in the Injunction itself, certifies to the Court in each individual case that, under the NASA-CSC Agreement, the employee involved was not involved in an “improper service contract operation” at the time he was noticed for separation; and

(2) That the motion to vacate should be denied as to the 110 employees NASA proposes to demote until the Civil Service Commission, as provided in the Injunction itself, certifies to the Court in each individual case that, under the NASA-CSC Agreement, the employee involved was not involved in an "improper service contract operation" at the time he was proposed for demotion; and

(3) That the motion to vacate should be denied as to the 6 individual plaintiffs until the Civil Service Commission, as provided in the Injunction itself, certifies to the Court in each individual case that, under the NASA-CSC Agreement, the plaintiff involved was not a part of an "improper service contract operation" at the time he was noticed for separation or demotion;

Or, in the alternative, plaintiffs pray

(4) That the motion to vacate with respect to the aforesaid employees and plaintiffs be denied until Judge Holtzoff is available to conduct a hearing on said motion in the District of Columbia and to hear testimony from the Civil Service Commission regarding NASA's proposed application and administration of the NASA-CSC Agreement in these individual cases; and

(5) That the Court grant such other and further relief as may be just and proper in the premises.

Plaintiffs file herewith a proposed form of Order for the Court's consideration.

Respectfully submitted:

EDWARD L. MERRIGAN
Attorney for Plaintiffs,
1700 Pennsylvania Avenue, N.W.,
Washington, D.C.

Filed March 11, 1968

Memorandum

In view of the agreement reached by the Civil Service Commission and the National Aeronautics and Space Administration, the preliminary injunction heretofore granted is hereby vacated without prejudice to any administrative remedies that may be possessed by individual employees.

Counsel will submit proposed findings of fact and conclusions of law, and a proposed order.

/s/ ALEXANDER HOLTZOFF

United States District Judge

March 9, 1968.

Filed March 12, 1968

Order Vacating Preliminary Injunction

Upon the basis of the Findings of Fact and Conclusions of Law herewith filed in this cause, it is by the Court this 12 day of March, 1968,

ORDERED:

That the preliminary injunction heretofore granted in this cause (informally) on January 11, 1968 and (formally) on January 15, 1968, which enjoined Government defendant James E. Webb, Administrator, National Aeronautics and Space Administration ("NASA"), his officers, etc., from taking the reduction-in-force ("RIF") actions as to permanent civil service employees of NASA's George C. Marshall Space Flight Center, located at the Army's Redstone Arsenal, Huntsville, Alabama, scheduled to take effect on January 13, 1968, and further enjoining them to maintain the *status quo* prevailing as of January 12, 1968, in the cases of each such permanent civil service employee subject to such RIF actions, be, and hereby is vacated,

WITHOUT PREJUDICE to any administrative remedies that may be possessed by such individual employees in whose cases NASA now effectuates its RIF actions under the Agreement reached between the Civil Service Commission and NASA.

/s/ ALEXANDER HOLTZOFF
United States District Judge

Filed March 12, 1968

Findings of Fact and Conclusions of Law

This Court having on January 11, 1968 (informally) and on January 15, 1968 (formally) entered a preliminary injunction in this cause; Government defendants having moved to vacate this preliminary injunction; plaintiffs having filed their opposition; the Court having reviewed the papers and being sufficiently advised in the premises, and having entered a memorandum in the matter on March 9, 1968,

This Court now makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. The preliminary injunction temporarily enjoined Government defendant James E. Webb, Administrator, National Aeronautics and Space Administration ("NASA"), his officers, etc., from taking the reduction-in-force ("RIF") actions as to permanent civil service employees of NASA's George C. Marshall Space Flight Center, located at the Army's Red Stone Arsenal, Huntsville, Alabama, scheduled to take effect on January 13, 1968, and further enjoining them to maintain the *status quo* prevailing as of January 12, 1968, in the cases of each such permanent civil service employee subject to such RIF actions.

2. The Court (as indicated at the January 15, 1968 proceedings for settlement of the preliminary injunction order) granted the temporary injunction because of the then-prevailing extraordinary circumstance that a difference existed between the Civil Service Commission ("CSC") and NASA as to NASA personnel policies, the resolution of which might affect the proposed RIF actions.

3. The preliminary injunction order entered January 15, 1968, set forth in Proviso (1) "that this Court will immediately enter a further order dissolving this preliminary injunction * * * upon notification to the Court * * * [t]hat NASA and the Civil Service Commission have reached agreement, and concur in the judgment that *prima facie* application of this agreement to the available facts in the individual employee cases, does not warrant continued maintenance of the *status quo* as of January 12, 1968, in respect of these * * * employees, pending exhaustion of administrative remedies."

4. Government defendants have filed with the Court the NASA-CSC Agreement, executed by the NASA Administrator and Commission Chairman, which fulfills the requirement in Proviso (1) to the Preliminary Injunction. This NASA-CSC Agreement sets forth the following:

"1. That of the outstanding separation and reduction-in-grade notices as of January 12, 1968, which were 764, all but approximately 166 will be canceled. Of the 166 notices not canceled, approximately 56 will involve separation of employees and approximately 110 reductions in grade:

"2. That approximately 150 of the wage board employees who received reduction-in-force notices are being retained by NASA and will be retrained for placement within Marshall Space Flight Center:

- “3. That the 69 technicians who have received separation notices will be offered reassignment elsewhere in NASA at the same grade and for comparable positions with the payment of moving expenses: and
- “4. That upon lifting of the injunction the reduction-in-force will proceed with respect to the notices remaining, and the employees involved will be accorded their full rights under reduction-in-force regulations.”

Conclusions of Law

1. In view of the NASA-CSC Agreement, the vacating of the preliminary injunction is warranted in the public interest.

2. Accordingly, the preliminary injunction should be vacated, without prejudice to any administrative remedies that may be possessed by the individual employees whose RIF actions now proceed under the NASA-CSC Agreement.

/s/ ALEXANDER HOLTZOFF

United States District Judge

Dated: March 12, 1968

Government Defendants' Motion To Dismiss

Defendants by their attorney, the United States Attorney for the District of Columbia, move the Court to dismiss this action for lack of jurisdiction, on the four grounds set forth in defendants' Opposition to Motion for Preliminary Injunction.

Incorporated into and made a part of this motion by reference are the following exhibits:

(a) *Government Exhibits 1 & 2.* (These exhibits are annexed to defendants' Opposition to Motion for Preliminary Injunction.)

(b) *Government Exhibit A.* (This exhibit is annexed to defendants' Motion to Vacate Preliminary Injunction which is being filed simultaneously with the present motion.)

In support hereof, defendants submit a memorandum of points and authorities.

/s/
David G. Bress
United States Attorney

/s/
Joseph N. Hannon
Assistant
United States Attorney

/s/
Gil Zimmerman
Assistant
United States Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3261-67

LODGE 1858, AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, ET AL., *Plaintiffs*,

v.

JAMES E. WEBB, ADMINISTRATOR, NASA, ET AL., *Defendants*.

Washington, D. C.
April 9, 1968.

The above cause came on for hearing of motions before
THE HONORABLE ALEXANDER HOLTZOFF, United States
District Judge.

Appearances:

For the Plaintiffs:

EDWARD L. MERRIGAN, Esq.

For the Defendants:

GIL ZIMMERMAN, Esq.

Assistant United States Attorney

For the Intervenor:

PAUL A. PORTER, Esq.,

JAMES F. FITZPATRICK, Esq.

The Deputy Clerk: Lodge 1858, American Federation of
Government Employees and others v. James E. Webb,
Administrator, NASA, and others, Civil Action 3261-67.

The Court: Gentlemen, as you of course know, this Court
is thoroughly familiar with this case because it passed upon
the motion for preliminary injunction.

Consequently, only brief arguments will be helpful to the Court.

Mr. Zimmerman: I understand that, Your Honor. Thank you.

The Court: Have you handed up copies of the papers?

Mr. Zimmerman: I have my papers here, Your Honor.

We are here on the Government's motion to dismiss, which incorporates the grounds stated in opposition to the preliminary injunction, so I pass both papers up.

The Court: Very well. You may proceed, Mr. Zimmerman.

Mr. Zimmerman: I would suggest that since the intervenor supports the Government's motion to dismiss, that they be heard after us and then—

3 The Court: Very well.

Mr. Zimmerman: —the plaintiff.

I should like to inform the Court of the present status of this matter since Your Honor relieved the preliminary injunction.

On March 30, 1968 the final actions which were not cancelled were put into effect under the reduction in force.

The Court: What was put into effect?

Mr. Zimmerman: The final actions.

A total number of 21 separations, Your Honor, are involved.

The Court: How many?

Mr. Zimmerman: 21.

82 demotions.

82 reassignments without substantial injury to the individual.

A total of about 600 have been cancelled, Your Honor, pursuant to the agreement between NASA and the Civil Service Commission, which we have put in evidence as Government Exhibit A.

4 On the administrative appeals to the Civil Service Commission, I should like to inform the Court that the Civil Service Commission had asked

the individual appellants who are appealing their reduction in force actions, for further information as to the impact or effect upon the changes that came about on March 30.

The plaintiff Union, Your Honor, represents all or most of these people in the administrative proceedings. They asked for two additional weeks' time within which to supply this information, and that time is not yet up.

So that those individual appeals have not yet been decided at the first Civil Service level, and of course the final decisions by the Civil Service Commission on the individual appeals will be forthcoming thereafter.

The major ground that we urge that this Court should now dismiss this action is that the regular operation of the exhaustion doctrine should bar maintenance of the action.

The Court: Specifically, what does the complaint pray for or what is the cause of action?

Mr. Zimmerman: The cause of action is for the Court to review the reduction in force determination made
5 by NASA. A claim that they are not bona fide reductions in force—

The Court: But what relief is asked for?

Mr. Zimmerman: They ask for an injunction, which is now mooted. They ask for a declaratory judgment in regard to the illegality.

The Court: The injunction is not mooted.

Mr. Zimmerman: The injunction phase, Your Honor, is mooted insofar as they sought to remain on duty. In other words, part of the relief asked for was that they should not be separated. That aspect of the case—

The Court: They still want an injunction as to those employees as to whom a reduction in force or demotion notices have gone into effect; isn't that what they ask?

Mr. Zimmerman: Yes, Your Honor, but there a simple declaration by the Court, if the Court keeps this case, would meet the needs of the situation. There would be no need for an injunction.

If the courts ultimately determine that their rights have been violated there would be reinstatement—

The Court: You mean declaratory judgment—

6 Mr. Zimmerman: Yes.

The Court: That doesn't make any difference. I want to get at the cause of action. It is now limited, I presume—well, it seeks to enjoin, whether by declaratory judgment or by an injunction, the Government from putting into effect these removal notices; is that it?

Mr. Zimmerman: My understanding is that they wish reinstatement. They have been separated or demoted. For those who have been demoted they want reinstatement to their prior position.

The Court: I see. Either reinstatement or an injunction against the enforcement of the removal notices? They start out by seeking an injunction—

Mr. Zimmerman: Yes, Your Honor.

The Court: In other words, this is an action to enjoin the Government agency against discharging some people or demoting some people, isn't that it?

Mr. Zimmerman: That is the way it started out.

The Court: And that is what it is still.

Mr. Zimmerman: That is right, except that we suggest—

7 The Court: Now, then, what is the ground for your motion to dismiss?

Mr. Zimmerman: That the routine doctrine, operation of the doctrine of exhaustion of administrative remedies requires these individuals to go get a decision on the facts of their individual case before the Civil Service Commission, under the Civil Service regulations; then get a final decision by the Civil Service Commission on the individual appeal.

In those decisions the Civil Service Commission is being called upon, evidently, by the allegations made in the individual cases, to rule upon the legality of the actions taken. So that the Civil Service Commission will have to rule first.

Thereafter, if those individuals desire judicial review, if they feel aggrieved, that question will come before the Court in those individual cases, Your Honor; and in normal operation of the exhaustion doctrine—

The Court: Has anyone a loose copy of the complaint?

Mr. Zimmerman: Yes, Your Honor.

The Court: Let me have it.

No, just the complaint alone.

8 Mr. Merrigan: The complaint has exhibits, Your Honor.

The Court: Is this the complaint?

Mr. Merrigan: It is the complaint, Your Honor.

The Court: It is a pretty voluminous complaint. Very well.

Mr. Zimmerman: There was an extraordinary situation prevailing which impelled this Court, sitting in equity, to intervene.

The Court: Yes, I have a very vivid recollection of that.

Mr. Zimmerman: That is now no longer involved in the case.

We, therefore, suggest that the case should now follow the normal operation of the exhaustion doctrine.

We also say that there is a plain and adequate remedy in these appeals through the Civil Service Commission and, therefore, that equity jurisdiction lacks at the present time if we regard the case in its present posture.

We also suggest, as a third ground, that NASA and the Civil Service Commission have worked out a policy long-range solution for the entire problem.

9 The Court: I know. But your motion to dismiss, I take it, is based on the face of the complaint.

Mr. Zimmerman: It is based on the face of the complaint, as modified by events which have occurred since then.

The Court: Then you must make a motion for summary judgment.

Mr. Zimmerman: Then, Your Honor, we should like it dismissed for summary judgment.

I would suggest, however, it is my personal view that the exhaustion doctrine is jurisdictional and is not going to the merits. So, therefore, I would urge it be a motion to dismiss.

However, if Your Honor differs, we would like it converted to a motion for summary judgment on the same ground.

The Court: I think I would be inclined to dispose of the matter on a motion to dismiss, which would mean on the face of the complaint.

Mr. Zimmerman: Fine.

The Court: Because if I should treat this as a motion for summary judgment the question would arise
10 whether the other side should have additional time to file additional affidavits or something of that sort.

Mr. Zimmerman: We were only suggesting that the grounds on which we rely are the same whether it is denominated or labeled one or the other.

The Court: But if I am to consider subsequent events instead of limiting myself to the four corners of the complaint, then it becomes a motion for summary judgment and then the other side has a right to answer it as a motion for summary judgment.

Mr. Zimmerman: In that event, Your Honor, we reserve the right to file a motion for summary judgment subsequently, if need be.

The Court: Very well. But what I think I will do today is treat this as a motion to dismiss, which means I am limited to the four corners of the complaint.

Mr. Zimmerman: And we suggest, in addition, whatever be the basis, that the exhaustion doctrine applies in its proper course.

Excuse me, Your Honor. (Pause.)

It is brought to my attention by my colleague, Mr.

Hannon, that the after-occurring events whereby
11 some 600 or so of the people who were—of the original plaintiffs, being no longer aggrieved, that

if the complaint be amended to fit the situation of only those remaining, we would entertain it on that basis; but it would seem to be odd to have a moot question being considered by the Court relative to some 600 who are not being affected. We wish Your Honor to take that into account.

The Court: Very well.

Mr. Zimmerman: The second basis or alternative basis that we urge upon the Court is that since NASA and the Civil Service Commission have reached an agreement of policy within the Executive Department of the Government as to how the matter of service contracts and Government employees inter-mix or inter-face should be handled as a general proposition at the Marshall Space Center, and I hope elsewhere in the Government—

The Court: I can't consider that unless I treat your motion as a motion for summary judgment.

I am going to determine, first, whether the complaint sets forth a cause of action.

Mr. Zimmerman: I understand that, Your Honor.
12 Following that we are urging upon the Court that in its discretion, its judicial discretion, it decline to entertain this suit even if it has jurisdiction.

The Court: I see.

Mr. Zimmerman: That is the second ground we urge. As our basis for that we say let the Executive Department work this out, as they have been attempting to do.

I represent to the Court that they are doing it successfully, that there has been a great step forward in that regard; and the Court, under the doctrine that Your Honor has often espoused, will not interfere in the day-to-day operations of the Government. We suggest that that should be operative.

So, on these grounds, we urge that Your Honor dismiss:

First, that there be no jurisdiction because of the exhaustion doctrine.

Secondly, that Your Honor in the exercise of judicial discretion should not entertain this suit but remit the

individual plaintiffs who are still subject to the action, to their remedy after the Civil Service Commission has ruled.

13 Thank you, Your Honor.

The Court: Does counsel for the intervenor wish to add anything?

Mr. Porter: Your Honor, I am Paul Porter, representing the intervenor defendant here.

I wish to heed your admonition for brevity. However, I would direct your attention to the circumstance that the complaint, on its face, asks for a declaratory judgment as to the legality of this type of contract.

As Your Honor has observed, in the event you treat this as a motion to dismiss on the grounds that the plaintiffs do not under these circumstances have standing, you do not reach the question—and we don't think you should—of the legality of this particular contract or the type of contract that is involved here.

Now our interest is specifically with respect to the Goddard Space Center and the Marshall Space Center at Huntsville, but in addition we have a much broader interest and that is, the companies that are represented by the intervenor defendant here account for some four billion dollars of efforts that are being made in the defense and the space programs. There are over 250,000

14 employees that would be affected in the event there was a ruling here—and we don't think that you would reach that—that would taint the legality of these contracts.

We support the Government's motion completely that it ought to be dismissed.

I think Your Honor exercised your equity jurisdiction where NASA and the Civil Service Commission are now in agreement. We hail that as an act of judicial statesmanship. And that having been done, we believe that the complaint should be dismissed and let the parties develop their own relationships.

If you have no further questions, Your Honor, we again support the Government's position.

Mr. Zimmerman: I would merely say, Your Honor, executive statesmanship, not judicial. I trust the executive has that quality, too.

The Court: I will hear the other side.

Mr. Merrigan: May it please the Court, Your Honor, the complaint in this case seeks, really, three things.

Number one, it seeks a preliminary injunction—

15 The Court: You really have won the case because most of the removal notices and the demotion notices have been cancelled.

Mr. Merrigan: Your Honor, I really don't want to disagree with you on that because I think you were tremendous in granting the preliminary injunction in this case, but believe me, Your Honor, when the facts are known to the Court, we have not won this case.

We think the agreement between the two defendants is like an agreement between any other two defendants. They have done it their way.

I think that five of the six plaintiffs, the individual plaintiffs—

The Court: I am not going to go into the agreement between two Executive Departments.

Mr. Merrigan: On that basis—

The Court: I am going to decide only whether your complaint states a cause of action.

Mr. Merrigan: Our complaint obviously stated a cause of action when Your Honor granted the preliminary injunction and I say that it still—

The Court: It doesn't follow at all.

Mr. Merrigan: Well, it states this cause of action, if Your Honor will permit me:

16 The Complaint alleges that at the Marshall base down in Alabama NASA has—

The Court: I know what it alleges. Just how does it state a cause of action?

Mr. Merrigan: It states a cause of action under Roth against Brownell and Reynolds against Lovett that—

Still over a hundred-some-odd people, Your Honor, are being unlawfully removed from their positions while NASA keeps unlawful contract employees in their jobs.

The Court: Let's assume that is correct, that one hundred people are being removed unlawfully. The Government makes the point that each one of those has a remedy, an administrative remedy through the Civil Service Commission, and if it fails, then an individual action can be brought.

What you are seeking to do is to have this Court enjoin the Government agency from removing employees. That is most extraordinary.

Now how do you state a cause of action?

Mr. Merrigan: I say to Your Honor now that there are two things we would ask the Court to do under the
17 complaint:

One—Since Your Honor has ruled that the preliminary injunction must be vacated as to these hundred-some-odd employees and since it is conceded in this case that the Court will have ultimate jurisdiction over these individual cases after the administrative remedy is completed, we ask Your Honor to stay the case, insofar as these individuals are concerned, until the administrative remedy is complete.

Five of the six individual plaintiffs are still before the Civil Service Commission. We think they have been discriminated against to the highest degree. We think that if the Court dismisses the action, Your Honor, that they will be left pretty much at the mercy of the defendants.

We ask the Court to hold the case on the calendar until the administrative remedy is complete, then take it up again.

There is a second position, Your Honor. Plaintiff Lodge 1858 of the American Federation of Government Employees has a collective bargaining agreement with the defendant NASA. That collective bargaining agreement
18 states—

The Court: There is no such thing as a collective bargaining agreement with a Government department that

is binding in the sense in which that term collective bargaining agreement is used, and our Court of Appeals has so held.

Mr. Merrigan: No, Your Honor, the Court of Appeals, respectfully, has not held that.

The Court of Appeals has held that the Court should not intervene—

The Court: You mean you submit that the Court of Appeals held. You must be more courteous and urbane in your expressions when you are contradicting the Court.

Mr. Merrigan: Your Honor, I didn't mean to contradict you. I just meant that my interpretation of the Court of Appeals decisions—

The Court: Then say that.

Mr. Merrigan: —is that they have not held that a collective—

The Court: Then I am going to hold it, if necessary.

Mr. Merrigan: I would ask Your Honor not to do
19 that without considering the law on this subject first.

The Court: A collective bargaining agreement between a union and a Government agency is an entirely different type of document than a collective bargaining agreement between a labor union and a private employer.

Mr. Merrigan: Really not, Your Honor. I submit to the Court that is not so.

If the Court would look at 5 U.S.C. 7301 and would look at Executive Order 10988, which is printed right after 5 U.S.C. 7301, I think you will see that the President has given the agencies the right to make these agreements.

They have made the agreement. The agreement is before Your Honor. It specifically says on its face that the agency recognizes the union as the exclusive bargaining agent of the employees in this unit.

You heard Mr. Zimmerman tell the Court this morning that the Union is representing the employees in the administrative appeals.

The contract says on its face the agency commits itself that it will never have a reduction in force except in strict

compliance with laws and regulations.

The Court: It commits itself to do what?

20 Mr. Merrigan: It commits itself not to have a reduction in force in the bargaining unit except in strict compliance with laws and regulations. It says that in the bargaining agreement.

With regard to contracting, it says the employer will give the Union as much notice as possible in advance of contracting actions which may displace career employees:

"Employer agrees to minimize displacement by taking every possible prudent action to retain career employees."

And I would say to Your Honor that what the Court of Appeals has said, and I think correctly, is that in the administration of Executive Order 10988, that is, in the formulation of bargaining units and in the administrative day-to-day actions under the Executive Order, those things are not subject to court review; but once the Government puts its name to a contract with a union, it is the same thing as a contract with a union outside of the Government. The Government can't break it any more than the Union can.

21 And we say that this complaint in this case alleges a breach of contract by NASA of this collective bargaining agreement.

I think that the Court has never had before it, Your Honor, in this Circuit, a case involving a collective bargaining agreement. The two cases before the Court in the past have involved cases where unions have gone to the courts and asked them to direct the Secretary of the Treasury or the Postmaster General to make up bargaining units in such and such a way. Well, that is an administrative thing, which I think the Court should not get involved in. But I think it is far different, Your Honor, when you have a collective bargaining agreement which creates rights in the Government, creates rights in the Union.

Would Your Honor look at this contract for just a moment?

The Court: You have given it to me. You have stated its contents.

Mr. Merrigan: It is signed by the Government, Your Honor.

The Court: The question is, of course, whether this Court can enjoin the Government or a Government agency or order specific performance of a contract. This is
22 what you are really asking.

Mr. Merrigan: We are asking for a declaratory judgment, Your Honor, in this case, too, that this contract prohibits NASA from doing the things it has been doing in this case.

And, Your Honor, I think there are two things involved here: If the Government would agree that the case can remain pending until the—

The Court: No, I want to dispose of it one way or the other. I am either going to grant the motion or deny it. I don't do halfway things.

Mr. Merrigan: On that basis, Your Honor, we would ask you, very respectfully, to keep this case pending. The Court has ultimate jurisdiction; that is admitted and conceded. Keep it pending until these administrative appeals are finished.

The second point is that the exhaustion doctrine has nothing to do with the plaintiff Union, that it has standing to sue, it sues in the complaint on this contract.

We say this contract is enforceable through the courts against the Government under Executive Order 10988,
5 U.S.C. 7301, and on the basis of these decisions
23 by the Supreme Court in this Circuit that say when you sue a Government official to enforce a contract right and to prevent unfair competition—and here we say that the contractor employees are unfairly competing with these permanent Civil Service employees—that the Union has standing to sue.

Essentially that is it, Your Honor.

And, please, I hope the Court understands I didn't mean to be disrespectful on that.

I feel very deeply that in this particular case certainly the Union has as much standing as the intervenor to represent its members. Certainly the Union, which is recognized by management to represent its members, has the same standing. It certainly has the standing that the NAACP was given by the Supreme Court in NAACP against Alabama.

If this reduction in force goes through, the Union loses membership, the Union loses dues—

The Court: I can't go into that.

Mr. Merrigan: Well, Your Honor, those are the considerations the Supreme Court took into consideration in the NAACP v. Alabama case.

24 The National Motor Freight case, which Mr. Porter relied on when he sought intervention and it was granted by Your Honor, says that when an association represents its members and they will be aggrieved by the defendant's actions, there is standing to sue.

So, Your Honor, I respectfully say that Lodge 1858 does have standing.

But if Your Honor passes that question or reserves that question or rules against me on that question, I would still ask you to retain jurisdiction here until the appeals are completed.

Thank you, Your Honor.

OPINION OF THE COURT

The Court: This is an action by a Union of Federal Government employees and certain individual employees to enjoin a Government agency from discharging or demoting a large number of employees or, in the alternative, render a declaratory judgment adjudicating that the action of the Government, of which the plaintiffs complain, is invalid and in violation of law.

25 The defendants move to dismiss the complaint as not stating a valid claim for relief.

This is a most extraordinary suit. To ask the courts to enjoin a Government agency from discharging

employees or demoting them and thus interfere with the internal day-to-day administration of Governmental functions, would be a very unusual action for the courts to take.

To be sure, if any of the dismissals or demotions are in violation of the Civil Service Act, the individual employees against whom adverse action has been taken have an administrative remedy provided by law with the Civil Service Commission, and after that is exhausted they may bring individual actions for relief.

The relief that may be granted, however, is of a very limited character. The courts may not and do not interfere with the internal administration of Government departments.

This Court had occasion to discuss this general topic in another connection only a few months ago in the case of *Protestants and Other Americans United For Separation of Church and State v. O'Brien*, 272 F. Supp. 712, 715. There this Court stated:

26 "The courts may not, however, control or supervise the operations of the other two branches of Government. Thus, the courts may not interfere with the management of the internal affairs of either House of Congress or pass upon the qualifications of its members. So, too, the courts may not control, direct, supervise or interfere with the management, operation or activities of the departments or other agencies of the Executive Branch of the Government or of Government establishments such as public schools or public hospitals. Federal Judges are not supervisors or overseers of Government agencies or institutions."

Many years ago, Chief Justice Taney, in his usual pointed manner, in the case of *DeCatur v. Paulding*, 14 Peters 497, 516, made the following statement:

"The interference of the courts with the performance of the ordinary duties of the Executive departments of the Government would be productive of nothing but mischief

and we are quite satisfied that such a power was
27 never intended to be given them."

The Court is of the opinion that the complaint does not set forth a valid claim for relief because the Court may not enjoin a Government agency from discharging any of its employees, nor may it issue a declaratory judgment.

In addition, the doctrine of exhaustion of administrative remedies is peculiarly applicable in such a case and these remedies must be exhausted by individual employees affected adversely and only after the remedies are exhausted may relief be asked from the courts.

The fact that this Court at one time granted a preliminary injunction, which has since been vacated, does not affect the conclusion which the Court reaches. This Court, as it has stated more than once in the course of this litigation, would not have granted a preliminary injunction were it not for the following unusual situation: it appeared that the Civil Service Commission was questioning and investigating the action of the defendant agency in this case in connection with its personnel policies and interposed certain objections. The Court
28 granted a preliminary injunction in aid of the position of the Civil Service Commission, which is charged by law and by the President with the duty of enforcing personnel policies. It was for that reason, and that reason alone, that the preliminary injunction was granted.

It is apparent that the Civil Service Commission has completed its investigation and that the employing agency has apparently yielded to certain views of the Civil Service Commission by withdrawing a majority of the notices involved in this case.

I refer to this fact in order that the granting of the preliminary injunction should not be regarded by anyone as an expression of this Court that the complaint stated a cause of action. The purpose of the preliminary injunction was merely to maintain the status quo in view of this

extraordinary situation in which one Government agency was objecting to the actions of another, the former being charged with the personnel policies involved.

The motion to dismiss is granted and counsel may submit an order accordingly.

[Filed April 18, 1968]

Judgment

This cause having come before the Court on Government defendants' motion to dismiss, intervenor defendant's support thereof, and plaintiffs' opposition thereto; counsel having been heard; and the Court being fully advised in the premises and having entered an oral opinion in this matter,

It is by the Court this 18 day of April 1968, ORDERED, ADJUDGED AND DECREED:

That the action be, and hereby is, dismissed.

ALEXANDER HOLTZOFF

United States District Judge

Notice of Appeal

Notice is hereby given this 23rd day of April, 1968 that plaintiffs herein and each of them hereby Appeal to the United States Court of Appeals for the District of Columbia Circuit from the Judgment entered in this action on April 18, 1968 dismissing this action and the complaint herein.

EDWARD L. MERRIGAN

Attorney for Plaintiffs

1700 Pennsylvania Ave., N. W.
Washington, D. C.

4055 5 86

VOLUME II—JOINT APPENDIX
SUPPLEMENT TO JOINT APPENDIX
PRINTED EXHIBITS TO COMPLAINT

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,006

LODGE 1858, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES; EVERETT A. BROUILLETTE; EDWARD B. CAMPBELL; WILLIAM ELLETT; NEAL A. EASTER; ELMER GUNTER; DORIS RODEN, *Appellants*,

v.

JAMES E. WEBB, Administrator, National Aeronautics and Space Administration; JOHN W. MACY, JR., Chairman, U.S. Civil Service Commission; LUDWIG J. ANDOLSEK, Commissioner, U.S. Civil Service Commission; ROBERT E. HAMPTON, Commissioner, U.S. Civil Service Commission, *Appellees*.

and

NATIONAL COUNCIL OF TECHNICAL SERVICE INDUSTRIES,
Intervenor-Appellee

On Appeal From a Judgment of the United States District
United States Court of Appeals District of Columbia
for the District of Columbia Circuit

FILED JUL 22 1968

EDWARD L. MERRIGAN
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Malcolm J. Paulson
CLERK

4055 5 03

**SUPPLEMENT TO JOINT APPENDIX
PRINTED EXHIBITS TO COMPLAINT**

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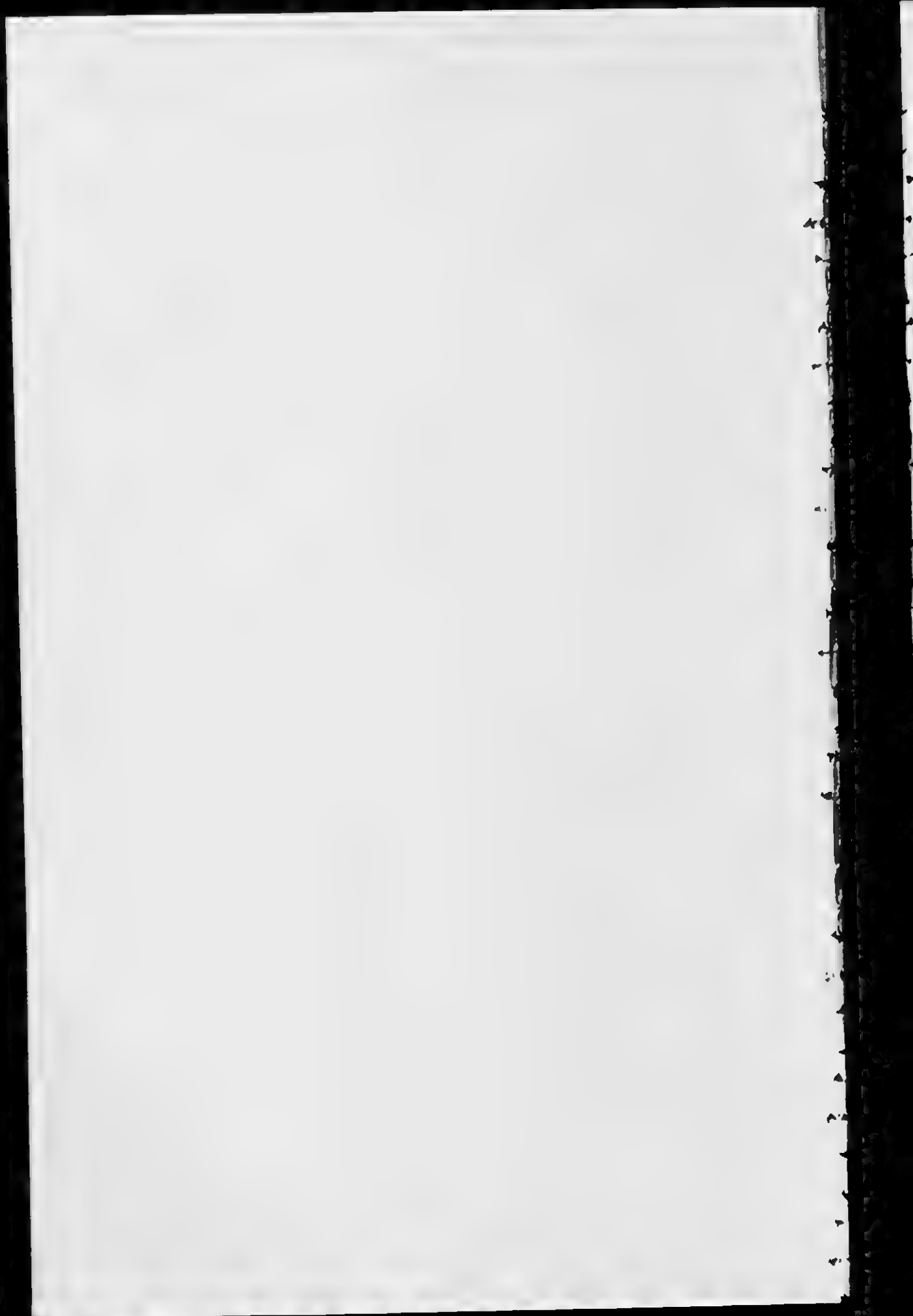


EXHIBIT A TO THE COMPLAINT**GEORGE C. MARSHALL SPACE FLIGHT CENTER AND AFGE**

The following agreement, negotiated late last year by the National Aeronautics and Space Administration's George C. Marshall Space Flight Center, Huntsville, Ala., and Lodge 1858 of the American Federation of Government Employees covers an activity-wide unit of some 2,530 white collar and 1,300 wage board employees.

Effective for three years from January 28, 1966, this agreement contains a detailed grievance procedure which provides for the holding of a fact-finding hearing before an internal Grievance Review Officer selected by the aggrieved employee, rather than advisory arbitration. The final decision on all grievances rests with the Center Director.

Other provisions cover recognition of union representatives, time-off to vote or register in national, state, and local municipal elections, rest periods and clean-up time, detailing to higher-level jobs for 30 days or less, and union participation in locality wage surveys.

• • • • •

PREAMBLE

This Agreement is entered into between the George C. Marshall Space Flight Center of the National Aeronautics and Space Administration, Huntsville, Alabama, hereinafter referred to as the Employer, and Lodge Number 1858, American Federation of Government Employees (AFL-CIO), hereinafter referred to as the Union.

It is the intent and purpose of the parties to this Agreement to promote and improve the efficient administration of the Federal Service, the vital mission which has been assigned to the Center, and the well-being of employees within the meaning of Executive Order 10988, dated January 17, 1962, to establish a basic understanding relative to the personnel policy, practices and procedures, and other

matters affecting conditions of employment which are within the discretion of the Director, George C. Marshall Space Flight Center, and to provide a means for amicable discussion and adjustment of matters of mutual interest.

In consideration of the mutual covenants herein set forth, the parties hereto, intending to be bound hereby, agree as follows:

ARTICLE I

Authority

Section 1. This Agreement is entered into pursuant to the authority granted in Executive Order 10988, dated January 17, 1962, and NASA Management Manual, General Management Instruction 17-7-2, and letter of exclusive recognition, dated May 28, 1965, from the Deputy Director, Administrative, George C. Marshall Space Flight Center, to the President, Lodge Number 1858, American Federation of Government Employees.

ARTICLE II

Recognition and Unit Description

Section 1. The Employer recognizes the Union as the exclusive bargaining agent, under the provisions of Executive Order 10988, for all employees in the unit (as described in Section 2). The Union recognizes the responsibilities of, and agrees to represent, fairly and equitably, the interests of all employees within the unit with respect to grievances, personnel policies, practices, and procedures or other matters affecting their general working conditions, without regard to whether or not the employee is a member of the Union, and regardless of the employee's race, creed, color, sex or national origin. The Union further agrees it will not engage in public acts against Governmental authority which have the effect of embarrassing the Government.

Section 2. The Unit to which this Agreement is applicable consists of all employees of the Center under the supervision of the Center Director except: (a) Management officials as defined in NASA Management Manual Chapter 17-7-2; (b) Employees engaged in Federal personnel work in other than a purely clerical capacity; (c) Employees engaged in Federal personnel work who handle confidential labor relations matters; (d) Supervisory employees who officially evaluate the performance of other employees; (e) Professional employees (e. g., Engineers, Accountants, Attorneys, Mathematicians, and Physicists) who are employed in their professional capacities; (f) Military detailees; (g) Consultants and Experts (as defined in NASA Management Manual, Chapter 17-3-16.2a, dated July 1, 1963); (h) Co-op students; (i) NASA Headquarters auditors; (j) Public Law 313 Employees; and (k) Temporary employees.

Section 3. It is further agreed that the Employer will not interfere with, restrain, or coerce any employee in the exercise of the rights to join or refrain from joining the Union, or because of membership or non-membership in, or activities on behalf of the Union which are outlined in Executive Order 10988, Agency regulations, or this Agreement. Both the Employer and the Union agree to be governed by the Code of Fair Labor Practices.

ARTICLE III

Restrictions of Law and Regulations

Section 1. It is agreed and understood by the Employer and the Union that this Agreement is subject to all applicable existing or future laws or regulations of the Federal Government, including but not restricted to, those rules, regulations and directives issued by the Civil Service Commission and applicable agency regulations.

Section 2. The Employer retains the responsibility and right, in accordance with applicable laws and regulations to:

(a) Direct employees; (b) Hire, promote, transfer, assign and retain employees in positions within the George C. Marshall Space Flight Center; (c) Suspend, demote, discharge, or take other disciplinary action against employees; (d) Relieve employees from duties because of lack of work or for other legitimate reasons; (e) Maintain the efficiency of the Government operations entrusted to them; (f) Determine the methods, means and personnel by which such operations are to be conducted; and (g) Take whatever action that may be necessary to carry out the mission of the George C. Marshall Space Flight Center in situations determined by the Director to constitute an emergency. Emergencies include, but are not limited to, those situations involving security, health, welfare, safety or protection of property.

ARTICLE IV

Consultation

Section 1. It is agreed and understood that matters appropriate for consultation between the parties are policies and procedures related to working conditions which are within the discretion of the Employer, including such matters as safety, training, labor-management cooperation, employee services, methods of adjusting grievances, appeal procedures, leave administration, promotion plan, demotion practices, pay regulations, reduction-in-force practices, and hours of work, except in those cases where the Center Director issues directives because of an emergency.

Section 2. The Employer will not consult with the Union with respect to such areas of discretion and policy as the Employer's mission, budget, organization, and assignment of personnel, or the technology of performing work.

Section 3. It is further recognized that this Agreement does not alter the responsibility of either party to meet with the other to advise and discuss in order to conscientiously seek mutually satisfactory solutions to appropriate matters not covered by this Agreement.

ARTICLE V**Union Representation**

Section 1. The Employer agrees to recognize the duly elected or appointed officers and shop stewards authorized by the Union.

The Union agrees to keep the Employer advised in writing of the names of its officers and shop stewards, hereafter referred to as Union representatives in this Article.

Section 2. The Union shall supply the Employer in writing, and shall maintain with the Employer, on a current basis, a complete list of all authorized Union representatives with the designation of the group of employees each is authorized to represent.

Section 3. Time off during regular working hours will be authorized to recognize Union representatives for the purpose of assisting or representing an employee in the preparation and presentation of a complaint or grievance when such time off will not adversely affect the mission of the Employer. If the supervisor of such Union representative believes that said representative's performance of his Union assignments interferes with his official MSFC duties, the matter will be discussed between the supervisor and Union representative. If these differences cannot be resolved, the matter shall be referred to the Personnel Officer and the Union President. All excused absences authorized shall be charged to an accounting number made available to the Union representatives by the Employer.

Section 4. When time off from the job is required for discussion or consultation with the Employer or to consult or represent an employee on a grievance or complaint, the Union representative shall notify his supervisor of his need to be absent from his place of duty. The supervisor shall make every attempt to allow the Union representative the specific time requested without charge to leave. This does not extend to short informal discussion between an em-

ployee and a shop steward on daily matters or problems that have not reached the point that significant time is involved. When a Union representative desires time away from his duty station to conduct internal Union business, he shall request annual leave or leave without pay for such purpose from his supervisor. If unable to do so because of urgent work requirements or emergencies, the supervisor will provide the requested time in the immediate future.

Section 5. Union representatives who are not employees of the Marshall Space Flight Center will be provided an official MSFC badge for their use when prior arrangements have been made: (a) to meet with management officials; (b) at the request of an employee to assist him in the preparation and presentation of a complaint or grievance; (c) to meet with an employee at the employee's request; (d) to accomplish special administrative assignments for the Union. Prior arrangements for such purposes will be made with the Personnel Officer. The Employer agrees to provide a meeting place where such visits can be held in private. The Union recognizes that failure to comply with the conditions stipulated above will constitute grounds upon which the Employer will revoke the Union representative's badging privilege.

Section 6. Whenever possible, and within the provisions of this Agreement that state the Employer has the right to regulate the workforce, the Employer agrees that no Union representative shall be transferred from one work shift and/or shop to another without prior consultation between the supervisor concerned and the Union.

Section 7. In order to allow for constructive and efficient consultation between the Union and the Employer, the Employer agrees, subject to its right to direct the workforce, to assign the Union's incumbent president, vice-president, assistant president, and executive vice-president to the day shift.

ARTICLE VI

Employee Complaint and Grievance Procedure

Section 1. The purpose of this Article is to provide for a mutually satisfactory method of settlement of employee complaints or grievances which arise from the employees' working conditions as well as those resulting from any alleged violation of this Agreement. This procedure shall provide a means of resolving complaints or grievances at the lowest possible administrative level of both the Employer and the Union. Nothing in this Article is intended to deny any employee the right to arrange settlement of his concerns directly with the Employer. However, such discussions will not interfere with his right to process his complaint or grievance through the procedure defined in this Article. The procedure in this Article is not intended to deny an employee the right to use the NASA Grievance Procedure as set forth in applicable regulations, if he so desires; however, no employee may use both procedures in processing the same grievance.

Section 2. *Definitions*

a. *Complaint.* An informal, oral expression by an employee to his supervisor about the employee's personal concern or dissatisfaction with his job duties, working conditions, or relationships which are not under his control, and the employee's request for corrective action.

b. *Grievance.* An employee's written expression of his personal concern or dissatisfaction concerning his job duties, working conditions, or relationship which are not under his control, and the employee's request for corrective action. Excluded from this article are those actions for which specific appeal procedures have been otherwise prescribed by law or regulation.

Section 3. *Complaint Procedure*

a. The employee must first informally discuss his complaint with his immediate supervisor, and attempt to resolve

the complaint through this method. (In the event that his complaint involves his immediate supervisor, the first contact may be with the next level supervisor.)

b. If necessary, the employee and his immediate supervisor should also hold informal discussions with higher level supervisors, and members of the Personnel Office.

c. At his discretion, the employee may have a representative of his own choosing assist him in the preparation and presentation of his complaint.

d. The employee's complaint must be submitted in good faith and within a reasonable period of time. Normally, complaints and grievances will not be accepted for consideration unless they are submitted within thirty (30) calendar days after the occurrence of the incident or incidents upon which they are based. The Center Director or his designee, may, at his discretion, authorize the immediate supervisor to consider a complaint which is submitted late.

e. When the employee cannot resolve his complaint informally through oral discussion, he may file a written grievance in accordance with that procedure.

Section 4. *Grievance Procedure*

a. *Step One—Supervisory Review*

(1) The employee must submit his grievance in writing to his second-line supervisor (the supervisor next in line of authority above his immediate supervisor) stating the nature of his personal concern or dissatisfaction, and the corrective action desired. (In the event that his grievance involves his second-line supervisor, the grievance will be submitted to the next level supervisor.)

(2) The second-line supervisor will review the grievance. If he does not have authority to effect the remedial action requested by the employee, he will forward the grievance, within three (3) work days after receipt, to the next higher supervisor and notify the employee of this referral.

(3) The supervisor with authority to act will consider the grievance, obtain any additional evidence he believes necessary, and furnish a written decision to the employee not later than ten (10) work days after he has received the grievance. If for some compelling reason, such as extended travel or heavy and priority work assignments, the supervisor cannot make a decision within the first ten (10) work days after receipt, he may delay the decision for a reasonable period of time (not to exceed ten (10) additional work days). If the supervisor cannot render a decision within this extended time period, he will forward the grievance to the next higher supervisor who will furnish a written decision within the time limits prescribed in this paragraph. As soon as it is known that a delay is necessary, the employee will be notified of the delay and its probable duration.

(4) The reviewing supervisor may (a) request the Personnel Officer to determine whether the grievance procedure is applicable, (b) grant the corrective action requested by the employee, (c) grant some other corrective action, or (d) deny the employee's request.

(5) At the request of the employee, or if the supervisor believes it desirable, he will permit the employee to present his grievance in person, as well as in writing. At his discretion, the employee may have a representative of his own choosing assist him in the oral and written preparation and presentation of his grievance.

(6) If the employee is not satisfied with the written decision of the supervisor, he may, within ten work days after receiving the supervisor's decision, request the Center Director, in writing, to review and change the supervisor's decisions, and grant the corrective action desired.

b. Step Two—Review by Grievance Review Officer

(1) Upon receiving the employee's written request for review, the Center Director, or his designated representa-

tive, shall select three eligible Grievance Review Officers. The names of these individuals shall be submitted to the employee or his representative who shall indicate his preference of these individuals to act as the Grievance Review Officer. Except in unusual or emergency circumstances, the employee's preference shall be honored. Where such preference cannot be honored, the employee may request that either the hearing be delayed or a new Grievance Review Officer be selected from the two individuals remaining from the original list of three.

(2) The Grievance Review Officer shall not be from the same organizational line of authority as the employee whose grievance is being considered, nor shall he be from the same line of authority as the supervisory or management official(s) who may be the subject of the grievance.

(3) The Grievance Review Officer shall review the written record and make positive efforts to settle the grievance through informal contacts between himself, the employee, the employee's representative, and intervening supervisors who have authority to resolve the grievance.

(4) The Review Officer shall consult with each line supervisor, in ascending order, between the one who made the initial decision and the Center Director. If any intervening supervisor believes the employee's request should be favorably considered, the Grievance Review Officer shall immediately reassign the case to this supervisor for disposition.

(5) The intervening supervisor shall grant remedial action requested by the employee, or some satisfactory modification thereof. He shall notify all parties to the grievance, in writing, of his decision within five work days following his receipt of the case.

(6) If the Grievance Review Officer has not successfully settled the grievance through the above procedure within ten (10) work days of his assignment to the case, he shall proceed with step three.

c. Step Three—Hearing and Review by Director

(1) The Grievance Review Officer shall schedule and conduct a fact finding hearing of the grievance within fifteen (15) work days of his assignment to the case. The U.S. Civil Service Commission Pamphlet No. 16, "Conducting Hearings on Employee Appeals," shall be used as a guide for holding hearings.

(2) The Union shall be given the opportunity to be present at grievance hearings involving employees within the Unit. The Union's right to be present does not extend to informal discussions between Management and the employee when the employee does not desire the presence of the Union representative.

(3) An official record of the hearing shall be made, including either a verbatim transcript of the testimony or a summary of the proceedings. The record will include the name and title of the member or members of the committee and all other persons participating in the hearing. Although a transcript is not required, mechanical recording equipment (tape recorders) will be used where possible since it may provide a more accurate record and preserve the atmosphere of the hearing.

(4) All parties to the grievance shall be afforded ample opportunity to present facts, question witnesses, present defense, etc., at the hearing. The Review Officer shall furnish both parties to the dispute a factual summary of the proceedings of the hearing within five (5) work days after completion of the hearing. All parties shall have five (5) work days in which to review the summary for accuracy. If accuracy of the proceedings is questioned, the Grievance Review Officer shall be contacted concerning the alleged inaccuracy. If no question is raised regarding accuracy of the summary within the allotted five (5) days, the record is deemed to be true and correct.

(5) The Grievance Review Officer shall forward the complete grievance file, including hearing proceedings, and his findings to the Center Director within fifteen (15) work days of the close of the hearing.

(6) The Center Director shall furnish his decision on the grievance to both parties, in writing, within ten (10) work days following receipt from the Grievance Review Officer. If for any reason the decision cannot be furnished within this time limit, the Center Director shall notify the employee of the reason for the delay and its probable duration.

(7) The Center Director's decision is final.

ARTICLE VII

Annual Leave

Section 1. Employees shall earn annual leave in accordance with applicable laws. Accrual of annual leave is a right of the employee in that its accrual may not be denied. The taking of annual leave is a right of the employee, subject to leave being scheduled and approved in accordance with work requirements. However, every reasonable attempt will be made to satisfy the desire of the employees with respect to approving annual and emergency leave.

Section 2. When the Employer finds it necessary to cancel previously approved annual leave, the reasons for such action will be explained to the affected employee. Denial of use of annual leave will be based upon factors which are reasonable, equitable, and which do not discriminate against any employee or group of employees.

Section 3. Where practicable, the Employer will grant the use of annual leave as requested by the employee. However, the Employer will assure that the scheduled vacation periods are planned and will otherwise grant or direct the use of annual leave as permitted by local circumstances and working conditions.

Section 4. Where unforeseen emergencies arise requiring the use of annual leave not previously approved, approval of the use of annual leave may not be presumed by the employee. The employee must contact his supervisor or the supervisor's designated representative either personally or by phone as early as possible but not later than the end of the first half of the regular work shift and request approval of the use of annual leave.

Section 5. If for any reason the Employer schedules or effects a temporary shutdown of activities, every effort will be made to provide work for any employee not having annual leave to his credit. If work cannot be provided eligible employees will be advanced, upon request, the maximum amount of annual leave authorized under applicable regulations.

ARTICLE VIII

Sick Leave

Section 1. Employees shall earn and be granted sick leave in accordance with applicable statutes and regulations.

Section 2. Sick leave, if due and accrued, shall be granted to employees when they are incapacitated for the performance of their duties, provided that employees not reporting for work because of incapacitation for duty furnish notice to the Employer by telephone as soon as possible but not later than the end of the first half of the regular work shift. Failure to obtain the necessary approval or to give the notice required by this Article may result in the employee's absence being charged to absence without leave.

Section 3. Sick leave as necessary shall be granted to the extent due and accrued for medical, dental, or optical examination or treatment. Sick leave for these purposes normally will be applied for in advance, with minimum amounts of leave requested. The use of sick leave for such purposes is subject to the approval of the appropriate supervisor.

Section 4. The Employer agrees that a doctor's certificate will not normally be required for periods of absence on sick leave of three (3) days or less. The employee's initials on his time card will generally constitute the personal certification of the employee as to his incapacity for duty.

However, when the Employer has reason to believe that sick leave is being abused, the employee may be required to submit a doctor's certificate for absence of three (3) days or less.

Section 5. Normally, absences in excess of three (3) working days must be supported by a doctor's certificate. In certain instances, it may be unreasonable to require such a certificate. In such cases, a signed statement by the employee stating the nature of his incapacity and the reasons why a certificate was not obtained may be accepted in lieu of a certificate. The certificate or other evidence of incapacity must be submitted to the employee's supervisor within one (1) week after return to duty.

Section 6. Sick leave will be advanced only in clearly established cases of serious disabilities or ailments, and when required by the exigencies of the situation, and when:

a. The employee has submitted a request in writing to his supervisor. This request shall be accompanied by a supporting doctor's certificate.

b. The employee has exhausted all the available sick leave which he has to his credit.

c. The employee has used all annual leave he may otherwise be required to forfeit.

d. There is a reasonable assurance that the employee will return to duty.

Section 7. Sick leave advanced to an employee may never exceed thirty (30) days.

Section 8. When sickness occurs during a period of annual leave, the period of illness may be charged to sick leave, and the charge to annual leave reduced accordingly.

Section 9. Sick leave shall be charged on an hour-for-hour basis in accordance with the employee's daily tour of duty. The minimum charge for such leave shall be one (1) hour, and additional charges shall be in multiples of one (1) hour.

ARTICLE IX

Excused Absence for Registration and Voting

Section 1. The Employer agrees that employees will be excused to vote or register in national, state, and local municipal election(s) or referendums for periods of time that may be necessary to insure them an opportunity to vote on an election day in accordance with the NASA and Civil Service Commission regulations. The Employer and Union agree that, as a general rule, where the polls are not open for a national, state, local election or referendum at least three (3) hours, either before or after an employee's regular hours of work, the employee may be granted an amount of excused leave which will permit him to report for work three (3) hours after the polls open or leave work three (3) hours before the polls close, whichever requires the lesser amount of time off.

Section 2. In the event of exceptional circumstances where the general rule as described in Section 1 above does not allow an employee sufficient time to vote such employee may be excused for such additional time as may be needed to enable him to vote, depending upon the particular circumstances involved in his particular case, but the time shall not exceed a full day.

Section 3. Should an employee's voting place be located beyond the normal commuting distance and voting by absentee ballot is not permitted, such employee may be granted sufficient time off in order to be able to make the

trip to the voting place to cast his ballot. The Employer agrees to observe a liberal policy in granting the necessary leave for this purpose. However, an employee's time off for this purpose in excess of one (1) day shall be charged to annual leave, or if annual leave is exhausted, then to leave without pay.

Section 4. The Employer further agrees that for an employee who votes in a jurisdiction which requires registration in person, such employees may be granted time off to register on substantially the same basis as for voting, except that no such time off shall be granted if the employee can register on a non-work-day and the place of registration is within a reasonable one (1) day round trip travel distance of the employee's place of residence.

ARTICLE X

Excused Absence for Climatic Conditions

Section 1. When appropriate notice has been given by the Employer after the start of a regular work day that all or part of the installation will be closed because of climatic or disaster conditions, supervisors will notify their employees and will excuse them from duty without loss of pay or charge to leave for the period that the installation or applicable part of it is closed, subject to the conditions set forth in Section 2.

Section 2. Employees who are on previously approved annual or sick leave for the entire or part of the day will be charged that type of leave previously approved for the entire or part of the day they are on leave.

Section 3. Employees who apply for annual leave after the receipt of an early dismissal decision will be charged leave in multiples of one hour for the time to the early dismissal hour only.

Section 4. Controversial cases involving the question of whether or not an employee is entitled to excused absence pursuant to this Article shall be referred to the Employer's Personnel Office for settlement.

ARTICLE XI

Basic Workweek

Section 1. The basic workweek will consist of five (5) standard work days, Monday through Friday. The standard work day will consist of eight (8) hours and an additional thirty (30) minutes non-paid lunch period during which the employee shall be duty free.

Section 2. It is recognized by the Employer and the Union that in order to expedite the mission of the Employer and maintain an effective schedule of operations on a sound economic basis, it may be necessary to assign certain personnel to a tour of duty outside the basic workweek described above.

Changes to the basic workweek for certain employees shall be made only in those areas where the work requirements are on a regular, recurring, and continuous basis, and schedules can be determined in advance. No such assignment shall be made for the sole purpose of avoiding the payment of overtime, night differential, or holiday pay. Changes in the basic workweek will be subject to consultation between the Personnel Office and the Union prior to forwarding to the Center Director for approval.

Section 3. Tours of duty shall be established, or changed, at least two (2) weeks in advance, continued for at least two (2) weeks, and affected employees shall be notified in writing. When such a change constitutes a shift change, it shall be made in accordance with provisions of this agreement.

Section 4. The Employer agrees that all presently existing tours of duty outside the basic workweek will be reviewed in accordance with the criteria set forth in Section 2 above.

Section 5. The Center Director can make exceptions to this Article when conditions preclude compliance.

ARTICLE XII

Overtime

Section 1. Employer reserves the right to assign overtime. However, the assignment of overtime will be based upon mission and workload requirements and on factors which are reasonable, equitable, and which do not discriminate against any employee or group of employees. Individual employees will not be forced to work overtime or compensatory time against their expressed desires so long as full requirements can reasonably be met by other employees willing to work, and so long as those willing to work are not allowed to work an amount of overtime which diminishes their alertness to a degree that the required work cannot be satisfactorily performed.

Section 2. Employer will take into consideration any anticipated overtime when making work assignments and make such assignments to distribute overtime as equitably as possible among qualified employees. No employee shall be removed from a job and another employee assigned merely for the purpose of equalizing overtime. In the event that a dispute arises, the first line supervisor and the shop steward will discuss the problem and make every effort to resolve the issue.

Section 3. Insofar as practicable, overtime will be equally distributed among the available employees of the organizational element in which the overtime is to be worked when employee job descriptions and qualification requirements are the same, except in those situations where the application of this principle will adversely affect the capability of the organizational element as required by the Employer.

ARTICLE XIII

Rest Periods

Section 1. Employer agrees to permit rest periods during the daily tour of duty where it is determined they are required to produce the following results:

a. Protection of employee's health by relief from hazardous work or work which requires continual and/or considerable physical exertion.

b. Reduction of accident rate by removal of fatigue potential.

c. Working in confined spaces or in areas where normal personal activities are restricted.

d. Increased in or maintenance of high quality and/or quantity production traceable to the rest period.

Section 2. The rest period may not exceed fifteen (15) minutes during each four (4) hours of continuous work. If the period from the beginning of the daily tour to the luncheon period is less than four (4) hours, a rest period should be granted only in unusual circumstances. The rest period may not be a continuation of the lunch period. A rest period may not be granted where none of the criteria in Section 1 above is applicable.

ARTICLE XIV

Clean-Up Time

Section 1. Each organizational element will, where necessary, determine and allot a reasonable amount of time sufficient for clean-up and storage of work tools and equipment. No across-the-board clean-up time will be established; however, where it is determined that clean-up time is required, fifteen (15) minutes shall be considered as normally adequate. Exceptions to this normal time may be made where necessary.

ARTICLE XV

Shift Operation

Section 1. When the Employer determines that it is necessary for economical operation to establish more than one shift, the shifts shall be manned according to employee preferences so long as the employees' job descriptions and individual qualifications are the same. In cases where shifts cannot be manned completely on an employee preference basis, the Employer agrees to either (1) introduce a rotation plan which will equally distribute the shift among all employees with the same job description and individual qualifications required on the shifts, or (2) establish a permanent shift roster. The option selected shall be determined by a vote of the affected employees, with a majority rule deciding. If the latter case is selected, the Employer agrees to establish the permanent roster on the basis of unit employment seniority and when possible, to replace the senior employees desiring replacement with newly hired employees. Permanent rosters shall be established as far in advance as possible but not less than one (1) week prior to the shift initiation unless conditions prevent such time. Rotational rosters shall be established a minimum of one (1) week prior to rotation.

Section 2. It is understood that the application of the principle agreed to above will apply except in those situations where its application would adversely affect unit capability as required by the Employer. In these instances, the Employer agrees to consult with the Union prior to making the assignment.

In addition, the Employer reserves the right to effect deviation from this principle when its application would create a situation considered not in the best interests of the Government.

Section 3. Minor deviations from these base shifts for purposes of staggering traffic, and other considerations are not considered different shifts.

Section 4. Where three 8-hour shifts are in operation, a lunch period of not more than twenty (20) minutes will be granted. The lunch period will be considered as time worked for which compensation is allowed and employees must spend the time at or near their work stations.

ARTICLE XVI

Reduction In Force

Section 1. The Employer agrees to notify the Union in advance of reduction-in-force actions at which time the Union may make its views and recommendations known concerning the implementation of such reduction-in-force actions. In the event of a reduction in force, the Employer further agrees to fully explain to the Union the competitive levels to be affected and the justification therefor.

Section 2. In the event of a reduction in force, existing vacancies will be utilized to the maximum extent feasible to place employees in continuing positions who otherwise would be separated from the service. All reductions in force will be carried out in strict compliance with applicable laws and regulations.

Section 3. Any career or career-conditional employee who is separated because of reduction in force will be placed on the Re-employment Priority List in accordance with applicable rules and regulations, and such employees will be given preference in inverse order for rehiring in temporary and permanent positions for which qualified. It is understood that acceptance of a temporary appointment will not alter the employee's right to be offered permanent employment.

ARTICLE XVII

Training and Employee Development

Section 1. The Employer will provide the employees with training and development opportunities which will enable the employee to do his work effectively, attain his career objectives, and accomplish the mission of the Employer. Such opportunities will be based on the interest of the National Aeronautics and Space Administration and on the interest of the employee; but, in no instances, solely for the benefit of the employee. Special emphasis within the authority and limitation of the Government Employee Training Act will be given to training which would qualify employees for other positions in the event of displacement, including displacement by virtue of automation.

Section 2. All training opportunities will be offered without regard to race, creed, color, sex, or national origin.

Section 3. Formal training for temporary employees will normally be confined to training in areas directly related to the position held by the temporary employee, and they will not receive formal training for the purpose of replacing a career employee.

Section 4. When advance knowledge of the impact of pending changes in function, organization, and mission is available, it shall be the responsibility of the Employer to plan for the retraining of employees involved when appropriate. Training agreements with the United States Civil Service Commission will be utilized when appropriate, in order to place employees in lines of work where their services can be utilized.

Section 5. Proposed employee development policies to be established or implemented within the authority of the Center Director will be submitted to the Union for review and comment prior to publication and implementation.

ARTICLE XVIII

Merit Placement and Promotion

Section 1. The Employer agrees to fill vacant positions on the basis of merit and fitness and to maintain a career service which affords maximum opportunity for continuity of employment and optimum utilization of employee skills.

Section 2. The Employer agrees to conform to appropriate Civil Service Commission and agency regulations and directives in effecting such non-competitive actions as promotions, reassignments, changes to lower grade, transfers, or re-employment.

Section 3. The Employer shall post all vacancies for promotion on bulletin boards for a five (5) day period and, to the greatest extent possible, announce merit placement opportunities in the Center's official newsletter or other Center publications appropriate for the announcement.

Section 4. The Employer agrees to implement the promotion plan in accordance with all applicable existing or future rules or regulations and directives issued by the agency and/or Civil Service Commission.

Section 5. The Employer agrees to consult with the Union on proposed modifications of the MSFC Merit Promotion Plan.

Section 6. A list of the five (5) best qualified employees will be forwarded to the selecting official for his consideration. The selecting official will interview each candidate on the list and give utmost consideration to the best qualified candidate in the organizational unit where the vacancy exists.

ARTICLE XIX

Within Grade Increases

Section 1. Within grade increases for Class Act employees whose performance is at the acceptable level of competence are provided for those employees who have met the prescribed length of service in grade.

Section 2. The determination as to whether an employee is or is not performing work at an acceptable level of competence will be based upon the evaluation of the employee's performance by his supervisor.

Notice of an unacceptable level of competence must be given an employee at least thirty (30) days in advance of the effective date. The supervisor must notify the laboratory or office chief through appropriate channels.

Section 3. An acceptable level of competence generally denotes work of a level above that typified by the marginal employee.

Section 4. If an employee believes the determination is not valid, he may obtain reconsideration by submitting a written request to the Personnel Office within thirty (30) days from the date of the determination. The reconsideration will be accomplished at the next organizational level above the official making the original determination and within ten (10) working days of the date of employee's request. The determination made at that time will not be subject to further review.

Section 5. The Employer agrees to implement within grade increases for Wage Board employees according to all applicable existing or future rules or regulations and directives issued by the agency and/or Civil Service Commission.

ARTICLE XX**Details**

Section 1. The Employer may detail employees when such action will relieve a temporary shortage of personnel, will reduce an exceptional volume of work, or will enable more effective administration by permitting necessary flexibility in assigning the work force. All details will be made in conformity with appropriate laws and regulations set forth in the Federal Personnel Manual. Details for prolonged periods will be avoided and formal personnel action will be used to secure desired services where it is expected that the need will continue for one (1) year or more. Details of employees for thirty (30) calendar days or less within the Center may be made by operating officials concerned. These informal details may not be extended beyond thirty (30) days. As soon as it is known that a detail in excess of thirty days is required, the operating official will prepare and forward Standard Form 52 requesting such detail to the Personnel Office for approval under the provisions of MSFC Regulations and Procedures, Chapter 17-1, Section 21.

ARTICLE XXI**Job Descriptions**

Section 1. Job descriptions will be written based upon the duties and responsibilities assigned to positions. All positions with identical assigned duties will be covered by the same job description.

Section 2. Copies of job descriptions will be distributed to the employee and his supervisor upon completion of official personnel action by organizational survey or individual action affecting the employee's duty assignment.

ARTICLE XXII

Union Participation in Locality Wage Surveys

Section 1. The Employer agrees to advise the Union of locality wage surveys and that the Union has the right to be represented by one (1) person among the group representing NASA at the organizational (initial) meeting of the locality wage survey board responsible for conducting the particular wage survey.

Section 2. Membership on a wage survey board shall be based upon qualifications and experience. The members shall be selected on their merits without regard to membership in organized groups, provided however, that at least one (1) qualified person, who is also a member of the Union, will be included on the locality wage survey board.

Section 3. Every MSFC member of the locality wage survey board shall only act in his capacity as a member of that board. He shall not act in the capacity as the representative of any organization. Further, any and all information gathered by any member is the property of the wage board and shall not be conveyed to any unauthorized person who is not a member of the board.

Section 4. Upon completion of the survey, the lead MSFC representative of the survey board shall consult with representatives of the Union to review known results. In no case shall the Union be given the rates furnished to the board by individual companies during or after the survey.

ARTICLE XXIII

Voluntary Withholding of Union Dues

Section 1. The Employer agrees to the voluntary withholding of Union dues as authorized by applicable law and regulations.

ARTICLE XXIV

American Federation of Government Employees Health Plan

Section 1. The American Federation of Government Employees Health Plan will be presented on the same basis as other approved employee health and insurance plans.

ARTICLE XXV

Training of Shop Stewards

Section 1. Training of Shop Stewards of the Union will be provided on duty time as part of the MSFC Training Program covering administration of this agreement.

ARTICLE XXVI

Reserve Parking

Section 1. The Employer recognizes that policies pertaining to reserve parking will be discussed with the Union. Reserve parking spaces will be limited in accordance with MSFC Administrative Regulations and Procedures, MSFC 24-12 (Change 3).

ARTICLE XXVII

Contracting

Section 1. The Employer will give the Union as much notice as possible in advance of contracting actions which may displace career employees. Employer further agrees to minimize displacement by taking every possible prudent action to retain career employees.

ARTICLE XXVIII

Travel

Section 1. Travel necessary for conduct of the Employer's function will be arranged in accordance with applicable laws and regulations.

Section 2. Within the prerogative of Employer's right to assure efficiency of work force operations, travel will

be scheduled so as to avoid undue hardship to the employee and to avoid travel during normal sleeping hours.

Section 3. When requested by the employee, the Employer agrees to advance travel funds up to the maximum extent authorized by applicable laws and regulations.

ARTICLE XXIX

Compliance with Agreement

Section 1. Matters which involve failure by the Union or the Employer to comply with the provisions of this Agreement shall be referred for resolution to the Personnel Officer and the President of the Union.

ARTICLE XXX

Distribution of Agreement

Section 1. A copy of the basic Agreement and all amendments shall be provided by the Employer to all Management officials and Union officials. It is further agreed that copies of the Agreement will be posted on official bulletin boards, and will be made available to employees upon request.

ARTICLE XXXI

Duration, Changes and Effective Date of This Agreement

Section 1. This Agreement shall continue in full force and effect for three (3) years from the date of approval in accordance with Executive Order 10988, and shall continue in effect from year to year thereafter unless amended, modified, or terminated in accordance with this Article.

Section 2. It is recognized that amendment(s) to this Agreement may be required because of changes in applicable laws, rules, regulations, or policies issued by higher authority after the effective date of this Agreement. In this event, the parties will meet for the purpose of negotiation to bring the Agreement into conformity with the new requirements. Such amendment(s) will be duly executed

by the parties and will become effective on the date such amendment is approved by the administrator, NASA.

Section 3. Either party desiring to modify this Agreement shall give written notice and proposed modification(s) to the other party at least sixty (60) days prior to the anniversary date of this Agreement. Subsequent negotiations shall be confined to the proposed modification(s). The Agreement shall remain in effect until the modification(s) are agreed upon by both parties, and approved by the administrator, NASA.

Section 4. This Agreement shall terminate automatically effective on any date on which it is determined that the Union is no longer entitled to exclusive recognition in accordance with the provisions of Executive Order 10988.

Section 5. This Agreement may be reopened for amendment or change at any time by mutual agreement of the Union and the Employer.

Signed this 4th day of November, 1965, at NASA, George C. Marshall Space Flight Center, Huntsville, Alabama.

NASA, George C. Marshall Space
Flight Center
Huntsville, Alabama
Lodge 1858, American Federation
of Government Employees
AFL-CIO

IN WITNESS WHEREOF the parties hereto have entered into this basic agreement this 4th day of November, 1965.

.....
Acting Director, George C. Marshall Flight Center

.....
President, Lodge No. 1858, American Federation of Government Employees

**EXHIBIT B TO THE COMPLAINT
REPORT TO THE CONGRESS OF THE
UNITED STATES**

**Violation of Statutes Governing Federal Employment
and Excess Costs Incurred**

Under A Contract

For Technical Writing and Related Services

Awarded by the

Goddard Space Flight Center

National Aeronautics and Space Administration

By the Comptroller General of the United States

October 1964

**COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548**

B-133394

October 19, 1964

**To the Speaker of the House of Representatives
and the President pro tempore of the Senate**

The Goddard Space Flight Center, National Aeronautics and Space Administration, entered into contract NAS5-2078 with Consultants and Designers, Inc., for the furnishing of technical writing and related services which resulted in a violation of the statutes governing Federal employment. Also, the cost of obtaining the services exceeded the cost that would have been incurred if the services had been performed by civil service employees.

Our review of the contract showed that the Center was able to supervise and control the contractor-furnished employees to substantially the same extent as it supervised and controlled its own civil service employees. A contractual arrangement under which the Government can control con-

tract work by exercising substantially the same supervision and control over contractor-furnished employees that it exercises over regularly appointed civil service employees violates the statutes setting forth the conditions and requirements relating to Federal employment.

Our review showed also that the contract for the service had been awarded without any determination of the relative cost of performing the services with contractor-furnished employees and with civil service employees. We estimate that the cost of the contractor-furnished services was about \$66,500, or 40 percent in excess of the cost that would have been incurred if the services had been performed by civil service employees who are subject to the Classification Act of 1949, as amended.

The Administration, in commenting on the operations under contract NAS5-2078 which gave rise to the violation of the statutes governing Federal employment, stated that the operations were not logical consequences of the contract terms. We noted, however, that when follow-on contract NAS5-3760 was entered into with Consultants and Designers, Inc., the terms of contract NAS5-2078 which gave rise to the violation.

**REPORT ON VIOLATION OF STATUTES GOVERNING
FEDERAL EMPLOYMENT AND EXCESS COSTS
INCURRED UNDER A CONTRACT FOR TECH-
NICAL WRITING AND RELATED SERVICES
AWARDED BY THE GODDARD SPACE FLIGHT
CENTER, NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION**

INTRODUCTION

The General Accounting Office has made a review of contract NAS5-2078 between Goddard Space Flight Center, National Aeronautics and Space Administration, and Consultants and Designers, Inc., Rosslyn, Virginia, for the furnishing of technical writing and related services. Our

review was made pursuant to the Budget and Accounting Act, 1921 (31 U.S.C. 53), and the Accounting and Auditing Act of 1950 (31 U.S.C. 67).

Our review included an examination of pertinent contract documents, applicable laws and regulations, and discussions with responsible agency personnel. The principal management officials of the National Aeronautics and Space Administration responsible for the administration of activities discussed in this report are listed in the appendix.

BACKGROUND

The Goddard Space Flight Center (GSFC), a field installation of the National Aeronautics and Space Administration (NASA), is located at Greenbelt, Maryland. It has responsibility for the management of applications satellite projects, unmanned scientific satellite projects, and worldwide NASA tracking and data acquisition operations. Technical writing and related services are required to prepare interim and final reports on the results of these activities. These services are performed at GSFC by Government employees and by employees furnished under contracts with commercial firms. The Documentation Branch, Technical Information Division, is the primary organization within GSFC using contractor-furnished personnel for the preparation of these reports.

Contract NAS5-2078 with Consultants and Designers, Inc., provided that the contractor would furnish to GSFC, on a quick-reaction basis, overall technical writing and related services. The contract was awarded on March 31, 1962, for a period of 1 year in an amount not to exceed \$100,000. Subsequent amendments extended the period to 24 months and increased the amount to \$1,000,000. The contract stated that the services required would be set forth by GSFC in individual work orders and that each work order, when fully executed, would constitute a separate cost-plus-a-fixed-fee contract.

The National Aeronautics and Space Act of 1958 provides NASA with general authority to enter into such contracts and to hire such employees as may be necessary to carry out the purposes of the act. The authority to enter into contracts is set forth in 42 U.S.C. 2473(b)(5), as follows:

“ * * * to enter into and perform such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of its work * * *.”

The authority to hire employees is set forth in 42 U.S.C. 2473(b)(2), as follows:

“ * * * to appoint and fix the compensation of such officers and employees as may be necessary to carry out such functions. Such officers and employees shall be appointed in accordance with the civil service laws and their compensation fixed in accordance with the Classification Act of 1949 * * *.”

The civil service laws (5 U.S.C. 631 *et seq.*) and the Classification Act of 1949, as amended (5 U.S.C. 1071 *et seq.*), govern the conditions of employment and payment of compensation by the United States Government. Provisions of these statutes serve as the basis for regulations governing the appointment of applicants to positions in the competitive service and to establish qualification standards for reinstatement, promotion, and transfer of Federal employees. Specific provisions in other statutes govern matters such as retirement benefits, pay scales and job classifications in accordance with duties and responsibilities, accrual of leave benefits including categories for annual and sick leave, and granting of preference to certain classes of persons because of past military service.

FINDINGS, CONCLUSIONS, AND RECOMMENDATION

Our review disclosed that a contractual arrangement with Consultants and Designers, Inc., under which GSFC exercised control over contractor-furnished employees who performed certain technical writing and related services resulted in a violation of the statutes governing Federal employment.

Our review further showed that the cost of services obtained by GSFC under contract NAS5-2078 was about \$66,500, or 40 percent, in excess of the cost that would have been incurred if the services had been performed by civil service employees with comparable skills.

STATUTES GOVERNING FEDERAL EMPLOYMENT WERE VIOLATED

Contract NAS5-2078 provided that (1) the GSFC technical representative had the right to reject any contractor-furnished employee not qualified to do the work, (2) the contractor could not, without the Government's consent, replace any contractor-furnished employee before completion of a project, (3) Government direction over work performed was to include general instructions and surveillance, and (4) contractor-furnished employees working at the Government sites were required to have daily time records certified by GSFC personnel.

Under this contractual arrangement GSFC was able to control the employees of the contractor to substantially the same extent as it controlled its own civil service employees. As in the case of a civil service employee (1) the contractor-furnished employee had to be acceptable to GSFC and (2) GSFC was able to control individual work assignments and to direct the manner in which the contractor-furnished employee performed his work. A contractual arrangement under which the Government can control the contract work by exercising substantially the same supervision and control over contractor-furnished employees that it exercises

over regularly appointed civil service employees violates the statutes setting forth the conditions and requirements relating to Federal employment.

Other means of controlling the work were available under the provisions of the contract. Articles IV, VI, and VII of contract NAS5-2078 provided that (1) work orders when issued to the contractor would contain technical instructions for performance of the work authorized; description of the material and/or services to be furnished, in reasonable detail, including, whenever appropriate, a reference to applicable plans and specifications; and inspection, delivery, and acceptance requirements as applicable, (2) the contractor was responsible for obtaining instructions necessary to effect completion of any work order, and (3) the contractor would permit access by GSFC as ordered and would submit all completed work to the initiating branch, as set forth in work orders, for final inspection and acceptance.

On November 20, 1962, we directed the attention of the Civil Service Commission (CSC) to contract NAS5-2078 and requested its comments. In a letter to us dated January 21, 1963, the CSC stated that contracting for personal services was an area of CSC concern that involved a number of other Federal agencies, particularly those having research and development missions, as well as NASA.

In June 1963 a representative of the CSC visited the GSFC and determined that the following methods of operation were in existence.

1. Contractor-furnished typists were interviewed by the GSFC technical representative, and contractor-furnished technical writers were interviewed by the GSFC technical representative and by a GSFC project scientist or project engineer. If the GSFC interviewers were satisfied as to the capabilities of an individual, the contractor was requested to assign that individual to GSFC.

2. Administrative supervision over contractor-furnished personnel was exercised by a contractor's representative, whereas technical supervision was exercised by GSFC supervisors. Work was assigned to technical writers and typists by GSFC supervisors and, when finished, was reviewed by the GSFC supervisors for format, style, contents, and quality. Standards of quantity and quality of the work to be performed were established by the GSFC supervisors.
3. Failures of contractor-furnished employees to meet the requirements set by the GSFC supervisors had resulted in requests to the contractor for the replacement of technical writers or typists. The contractor had acceded in every case.
4. GSFC supervisors approved contractor-furnished employees' time records. Generally, approval for time off was requested in advance from a GSFC supervisor. If a contractor-furnished employee was ill, the employee reported the illness to a GSFC supervisor.

On July 18, 1963, the Civil Service Commission supplemented its earlier letter to us and stated that the method used by GSFC in employing technical writers and typists under contract NAS5-2078 was in violation of the Civil Service Act and the Classification Act of 1949, as amended.

Agency comments and our evaluation

In a letter to us dated April 2, 1964, the Associate Administrator for Space Science and Applications, NASA, in commenting on the operations under contract NAS5-2078 that gave rise to the violation of the statutes cited in this report, stated that the operations were not logical consequences of the contract terms.

Although the Associate Administrator has taken the position that the operations that gave rise to the violation of

the statutes governing Federal employment were not logical consequences of the contract terms, we have noted, although it was not mentioned in his letter to us, that when follow-on contract NAS5-3760 was entered into on March 12, 1964, with Consultants and Designers, Inc., the terms of contract NAS5-2078 which gave rise to the violation of the statutes establishing the conditions of Federal employment were omitted. In contrast to contract NAS5-2078, this new contract omits terms which (1) permitted the GSFC technical representative to reject any contractor-furnished employee, (2) required the consent of the Government to replace any contractor-furnished employee prior to the completion of a project, and (3) required contractor-furnished employees to have daily time records certified by GSFC personnel. The new contract clearly defines technical direction as a guide to accomplishing the contractual statement of work. In addition, Article X, Contractor's Project Supervisor, requires the contractor to designate a project supervisor to be the contractor's authorized supervisor for technical and administrative performance of all work orders under the contract.

Also, NASA's Acting Director for Procurement, on April 21, 1964, issued bulletin NPC 401, NASA Policy and Procedures For Use Of Contracts For Nonpersonal Services, which established requirements to be followed when issuing non-personal-service type of contracts. Section 4j of this bulletin, Placement of Contracts—Terms and Conditions, states:

"The contract must clearly set forth the working relationship between Government employees with responsibilities for administering the services and contractor employees performing the services, including a requirement on the contractor for direct supervision of his employees. To the extent placement of tasks from time to time are required, provision must be made in the contract for such placement through contractor

supervisory personnel rather than direct to individual personnel performing the services."

In regard to the follow-on contract, the Associate Administrator, in supplementing his earlier letter to us on June 29, 1964, cited the substantive differences between contracts NAS5-2078 and NAS5-3760 with Consultants and Designers, Inc., and stated that:

"From the foregoing analysis, we think it is clear that NASA has made substantial improvement in Contract NAS5-3760, the successor Contract to NAS5-2078."

We believe, however, that consideration should have been given to determining whether it would be preferable and more economical to have the technical writing and related services performed by regular civil service employees rather than by contractor-furnished employees.

PERFORMANCE OF SERVICES BY CONTRACTOR-FURNISHED EMPLOYEES RESULTED IN EXCESS COSTS

During the period from March 31, 1962, through December 31, 1963, GSFC paid the contractor about \$229,000 for the technical writing and related services furnished under the contract. Our review of the contract files showed that GSFC had made no analysis of the cost alternatives of performing the work by contractor-furnished employees or by civil service employees. We estimate that the cost of obtaining the services under the contract was about \$66,500, or 40 percent, in excess of the cost that would have been incurred if the work had been performed by civil service employees with comparable skills.

Contractor NAS5-2078 required GSFC to reimburse the contractor for the cost of direct labor and overhead and to pay a fixed fee for each individual work order issued under the contract. The cost to the Government of performing such work with civil service employees would in-

clude such expenses as those for pay, leave, retirement, and insurance. A comparison of the cost of performing the work with contractor-furnished employees with the cost of performing the work with civil service employees follows:

Cost of performing the work with
contractor-furnished employees:

Labor	\$169,000
Overhead	48,000
Fee	12,000
	<hr/>
Total	229,000

Cost of performing the work with
civil service employees:

Pay	\$129,000
Leave	23,500
Retirement	8,000
Health insurance	1,500
Life insurance	500
	<hr/>
Total	162,500

Excess costs resulting from use contractor-furnished employees	<u>\$ 66,500</u>
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The grade and level within each grade for civil service employees with comparable skills needed to perform services similar to those provided under contract NAS5-2078 were furnished to us by the Chief, Technical Information Division, GSFC, who had responsibility for all work performed under the contract. The information furnished was for regular full-time civil service employees inasmuch as the services obtained under the contract had been on a continuing basis over a substantial period of time.

Agency comments and our evaluation

In his letter of April 2, 1964, the Associate Administrator questioned the value of our comparison of the cost of performing the work with Government personnel and with

contractor-furnished personnel because "it does not reflect all the costs which are relevant to an accounting determination of the Government's costs when the Government itself performs particular work." The Associate Administrator stated his belief that a more meaningful comparison would have been obtained had a realistic overhead factor been utilized.

The indirect costs cited by the Associate Administrator were considered by us in our comparison of the relative costs of performing the services with civil service employees and with contractor-furnished employees. The cost of most of the overhead items, such as supervision, heat, light, space, communications, equipment, and supplies, would not have been affected since the items would have been supplied to the civil service employees just as they had been supplied to the contractor-furnished employees. Any increase in the cost of other overhead items resulting from the use of civil service employees would be more or less offset by a corresponding decrease in the cost of contract administration associated with contractor-furnished employees. In any event, we believe that, prior to the award of contract NAS5-2078, GSFC should have compared the costs of performing the work with civil service employees and with contractor-furnished employees. In this regard, NASA's recently issued policy and procedures bulletin on non-personal-service type of contracts provides, in Section 3e(4), Criteria for Contracting Out, that:

"If this factor is considered significant, it must be evidenced by a study showing comparative costs between direct employment and contracting-out."

CONCLUSIONS

We believe that the manner in which the operations under contract NAS5-2078 with Consultants and Designers, Inc., was carried out clearly showed that the terms of the contract intended that the employees furnished to GSFC

under the contract be controlled by the Government to substantially the same extent as civil service employees. This contractual arrangement resulted in a violation of the statutes governing Federal employment.

The cost of the services procured under NAS5-2078 was about \$66,500, or 40 percent, in excess of the cost that would have been incurred if the services had been performed by civil service employees who were subject to the Classification Act of 1949, as amended. Had GSFC given consideration to the cost of alternatives of performing the work by contractor-furnished employees or by civil service employees prior to the award of contract NAS5-2078, it would have been apparent that economies could be achieved by the use of civil service employees.

NASA's April 1964 policy and procedures bulletin setting forth appropriate criteria to all NASA installations on the use of contracts for nonpersonal services, if properly implemented, should tend to prevent further violations of the statutes referred to in this report and the incurrence of excess costs for such services. The financial arrangements under the follow-on contract, however, require further consideration.

Recommendation

In light of the uneconomical aspects of contract NAS5-2078, we recommend that NASA (1) compare the cost of the services being obtained under follow-on contract NAS5-3760 with the cost of the services if performed by civil service employees and (2) if excess costs are being incurred, make arrangements for the performance of the work by civil service employees.

EXHIBIT C TO THE COMPLAINT
REPORT TO
THE CONGRESS OF THE UNITED STATES

**Potential Savings Available Through Use of Civil Service
Rather than Contractor-furnished Employees
for Certain Support Services**

**National Aeronautics and Space Administration
By the Comptroller General of the United States
June 1967**

**COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D. C. 20548**

B-133394

June 9, 1967

**To the President of the Senate and the
Speaker of the House of Representatives**

The accompanying report presents the results of our review of the relative costs of using civil service personnel or contractor-furnished personnel to perform engineering and related technical support services at the National Aeronautics and Space Administration's Goddard and Marshall Space Flight Centers.

Our review at Marshall was limited to three contracts for services to be performed in three laboratories, for which Marshall incurred about \$24.4 million in costs, excluding common costs, during the contract year ended in fiscal year 1966. At Goddard, we reviewed six contracts providing for engineering and related technical support services; the estimated cost of these contracts was about \$19.9 million, excluding common costs, over a 3-year period.

Our review of the relative costs of obtaining the necessary services through the use of support contracts and through the use of civil service employees showed that estimated annual savings of as much as \$5.3 million could be achieved with respect to the contracts we reviewed at Goddard and Marshall if these services were to be performed by civil service employees.

Also, it appears that additional savings could be achieved at the Marshall Space Flight Center and other Space Administration centers as evidenced by the results of studies accomplished or sponsored by the agency itself.

The indicated savings are attributable, for the most part, to the elimination of many contractor supervisory and administrative personnel, which would result from a conversion to civil service staffing and the elimination of the fees paid to the contractors.

By letter dated April 20, 1967, the Associate Administrator for Organization and Management provided us with the Space Administration's comments on our findings and conclusions. As a general justification for the use of the contractor personnel, the Associate Administrator stated, in essence, that the rapid development of the civilian space program had, from its inception, required the extensive use of support service contracts to accomplish assigned objectives. The Associate Administrator informed us that there were factors and considerations other than costs which would continue to be of a major significance in determining whether to contract for services.

Although recognizing that we gave consideration to factors other than cost in presenting our conclusions, the Associate Administrator stated that, in the situations discussed in our report, such factors supported the Space Administration's decisions that contracting for the services involved had been in the best interests of the Government.

We have no basis on which to question the Associate Administrator's views regarding the need for such services

to carry out the objectives of the Space Administration's rapidly developing program, or his views regarding the significance of factors other than cost in determinations to contract for services. We recognize that, because of changing objectives or requirements, the National Aeronautics and Space Administration, as a practical matter, would probably have to continue to depend to some degree on support service contracts.

Although we recognize the possible merit of those considerations, it is our view that the Space Administration's policies relating to the use of such contracts have not been sufficiently clear as to the consideration which should have been accorded to relative costs in determining whether contractor-furnished or civil service personnel should be used.

In any event, we believe that, in contrast to its past rate of growth, the Space Administration has now achieved a relative degree of stability and should be able to better consider relative costs in assessing the extent to which it should continue to rely on the use of support service contracts. In this regard the Associate Administrator advised us that the Space Administration recognized the need for more specific guidance on cost considerations and that such guidance would be part of any redefinition of policy resulting from a current review of agency experience in the use of support service contracts.

We are bringing this matter to the attention of the Congress because of the potential for savings that we believe would result from greater consideration by the National Aeronautics and Space Administration of the relative cost of contractor and in-house performance of support services. Also, because the action to fully correct the situation discussed in this report would require a significant change in the Space Administration's policy relating to the use of support service contracts and because of the potential effect that a significant change may have

on its civil service personnel requirements, the Congress may wish to consider the policy aspects of this matter in further detail with agency officials.

The Congress may also wish to explore with the National Aeronautics and Space Administration the impact that cost considerations should have in determining whether to use contractor or civil service personnel in those cases where either contractor or civil service personnel could equally carry out the operation.

Copies of this report are being sent to the Director, Bureau of the Budget, and the Administrator, National Aeronautics and Space Administration.

ELMER B. STAATS,
*Comptroller General
of the United States*

REPORT ON POTENTIAL SAVINGS AVAILABLE
THROUGH USE OF CIVIL SERVICE RATHER
THAN CONTRACTOR-FURNISHED EMPLOYEES
FOR CERTAIN SUPPORT SERVICES NATIONAL
AERONAUTICS AND SPACE ADMINISTRATION

INTRODUCTION

The General Accounting Office has made a review of the relative costs of using civil service and contractor personnel for engineering and related technical support services at the National Aeronautics and Space Administration's (NASA) Goddard Space Flight Center (GSFC), Greenbelt, Maryland, and the Marshall Space Flight Center (MSFC), Huntsville, Alabama. Our review was made pursuant to the Budget and Accounting Act, 1921 (31 U.S.C. 53), and the Accounting and Auditing Act of 1950 (31 U.S.C. 67).

This review was initiated because an earlier review indicated that savings would be attainable if NASA used civil service instead of contractor-furnished personnel to perform certain types of support services. Our review was directed primarily toward examining into the costs of performing necessary engineering and related technical support services with contractor employees or with civil service employees. We reviewed applicable laws and regulations, pertinent contracts, and other records and conducted discussions with responsible NASA and contractor personnel.

The principal NASA management officials responsible for the activities discussed in this report are listed in Appendix I.

BACKGROUND

The National Aeronautics and Space Act of 1958, as amended, provides NASA with general authority to hire employees and to enter into such contracts as may be necessary to carry out the purposes of the act.

NASA's policies relating to the use of contractor-furnished personnel are set forth in a policy statement entitled "NASA Policy & Procedures for Use of Contracts for Nonpersonal Services" (NPC 401). NPC 401 was issued in April 1964, shortly after reviews by both this Office and the Civil Service Commission disclosed that the method used by the Goddard Space Flight Center in employing technical writers and typists under contract resulted in violation of the Civil Service Act and the Classification Act of 1949, as amended. In a report to the Congress dated October 19, 1964 (B-133394), we reported that GSFC's actions were in violation of these acts because its personnel were giving technical supervision to the contractor's employees, were assigning work, and were establishing standards of quantity and quality for the work to be performed.

NPC 401 states that, generally, services necessary in connection with governmental activities are for performance by regular employees of the Government and subject to Government supervision. The policy states, however, that the complexity and urgency of NASA's activities require heavy reliance on the capabilities of industrial, educational, and research institutions.

NPC 401 provides, in part, that contracting for services, particularly engineering and technical services, be utilized in order that the resources available to NASA be put to their most effective use. NPC 401 provides also that the contracts be written and administered so that the contractors' duty is to provide an end product rather than merely to furnish personnel for the Government's use. In this connection, NPC 401 requires a separation of contractor-furnished personnel from Government personnel, a clear identification of contractor personnel, a definition of work assignments in terms of an end product, and the use of contractor-furnished supplies or equipment when practicable; NPC 401 further requires that the contractor directly supervise its employees.

NASA's policy statement also sets forth the specific criteria to be considered by NASA officials in determining whether to contract for support services. These criteria are summarized as follows:

1. Contracts for services may not be used to evade personnel ceiling limitations.
2. If services are of a type that historically has been performed by Government employees, there must be compelling reasons for contracting.
3. Performance of support services by Government employees should be examined and a determination made as to whether continued performance by Government employees is more economical and efficient than by contract.
4. Consideration should be given as to whether suitably qualified Government personnel are readily available

or obtainable at the installation involved for timely and efficient performance of the services required.

The policy states that the following factors, among others, are generally indicative of the propriety of contracting for services.

1. The services require special knowledge or skills not readily available through the civil service.
2. Performance of the services requires the furnishing and use of special equipment not readily available to the Government.
3. The services are intermittent or temporary in character, thus making impracticable the full-time employment of Government personnel.
4. Contracting for the services is more economical than performance by Government employees. If this factor is significant, a study showing comparative costs between direct employment and contracting out is to be made.

The policy states further that the existence of a preponderance of the above factors would more readily support a need for contracting, but that any one or more can, in a particular instance, provide adequate justification for such action. Although the criteria indicate that relative costs of performance are to be considered, there is no specific requirement that a cost comparison be made to determine which method would be less costly prior to a decision to award a contract for the services required. As indicated above, cost studies are required only in those situations where the installation believes that contracting out is more economical, and then cost studies are required only if cost is expected to be a determining factor in the final decision.

NASA, consistent with its policy, has relied heavily over the years on the capabilities of industry to carry out its activities. In response to queries by the Senate Committee on Aeronautical and Space Sciences during the fiscal year

1967 NASA budget authorization hearings regarding the use of contract personnel, NASA stated that, during fiscal year 1965, the average number of contractor personnel working at its Centers was about 16,800. NASA stated also that the average number of such personnel would rise to about 22,400 in fiscal year 1966 and to about 24,900 in fiscal year 1967 primarily as a result of the increase in operational activities at the Kennedy Space Center. NASA's civil service personnel ceilings for fiscal years 1965, 1966, and 1967 were about 33,200, 33,900, and 34,300, respectively. Thus, although the number of civil service personnel was estimated to increase by about 1,100 during these fiscal years, the corresponding estimated increase of about 8,100 contractor personnel during the same period contemplated a continuing and extensive use of contractor personnel rather than civil service personnel to carry out its activities.

At both Centers there is generally one prime support contractor for each laboratory or division for which support is provided. Generally each prime contract is written to cover a period of 1 or 2 years with a provision for renewal, at the option of the Government, for 1 to 4 additional 1-year periods. The usual type of contract entered into by NASA to secure these services is the negotiated cost-plus-award-fee contract under which the Government pays the contractor all allowable costs incurred in the performance of the contract plus a fee which varies within specified limits based upon an evaluation of the contractor's performance. This evaluation of performance is generally based on the consideration of such factors as quantitative and qualitative sufficiency of personnel furnished, cost of performance, quality of performance, and schedule effectiveness.

FINDINGS AND MATTER FOR CONSIDERATION OF THE CONGRESS

POTENTIAL SAVINGS AVAILABLE THROUGH GREATER USE OF CIVIL SERVICE EMPLOYEES TO PROVIDE ENGINEERING AND RELATED TECHNICAL SUPPORT SERVICES

Our review of the relative costs of obtaining necessary engineering and related technical support services through the use of contractor-furnished employees and through the use of civil service employees showed that, at MSFC and GSFC, estimated annual savings of as much as \$5.3 million could be achieved if the functions covered in our review were to be performed by civil service employees. The indicated savings at both locations (about \$4.8 million annually at MSFC and about \$1.5 million over 3 years at GSFC) are attributable, for the most part, to reductions in the number of supervisory and administrative personnel currently employed by the contractors and to the elimination of fees paid to the contractors.

Our findings were submitted to the National Aeronautics and Space Administration for review and comments. Specific comments of NASA are discussed in pertinent sections of the report. The comments are included in total as Appendix II of this report.

Cost comparisons of contract versus civil service staffing

Our estimates of cost are based on the cost criteria outlined in Bureau of the Budget Circular No. A-76, dated March 3, 1966. This circular sets forth the guidelines and procedures to be applied by executive agencies in determining whether commercial and industrial products and services used by the Government are to be provided by private suppliers or by the Government itself.

Marshall Space Flight Center

The Marshall Space Flight Center was established, effective July 1, 1960, by the transfer of the Development Operations Division of the Army Ballistic Missile Agency to NASA. Prior to the transfer, the work of the Development Operations Division was carried on by a combination of civil service and contractor employees. The contractor support arrangement was continued, essentially with the same contractors, after the establishment of MSFC. Employees of support contractors generally work in facilities furnished by the Government at MSFC, although there is some off-site work because sufficient facilities are not available at the Center.

MSFC's primary responsibility is the development and procurement of the Saturn family of launch vehicles. To accomplish its responsibilities, MSFC is organized into two groups—Industrial Operations and Research and Development Operations.

The Industrial Operations, the smaller of the two groups in terms of the number of employees at MSFC, is essentially responsible for awarding and administering contracts for major components of the Saturn launch vehicles and for directing and coordinating the activities of the manufacturing or "hardware" contractors supplying these components.

The Research and Development Operations is responsible for performing research in areas related to MSFC's basic responsibilities and for providing necessary engineering support to the activities administered by the Industrial Operations. In addition, there are a number of administrative and staff offices which support both the Industrial Operations and the Research and Development Operations. The majority of support contract employees at MSFC work in Research and Development Operations and in certain staff offices.

At June 30, 1966, MSFC was obtaining engineering and related technical services under 11 contracts at a total estimated annual contract cost of \$69.9 million. Also, at that date, of a total complement of about 13,200 persons, about 7,300 were full-time civil service employees and about 5,900 were contractor employees. Our review of the relative costs of obtaining these services through the use of contractor furnished employees and through the use of civil service employees was limited to three contracts for services to be performed in three laboratories. On these three contracts, MSFC incurred about \$24.4 million in costs, excluding common costs, during the contract year ended in fiscal year 1966. These common costs were for supplies, travel, and other incidental items which would normally be incurred irrespective of whether the services were provided by contractor or by civil service personnel. The three laboratories were the Computation Laboratory, the Astrionics Laboratory, and the Propulsion and Vehicle Engineering Laboratory operated under the control of the Director, Research and Development Operations.

Our comparison of costs showed that annual savings of about \$4.8 million could be achieved if the engineering and related technical services being obtained under contract in support of the three laboratories covered by our review were to be performed by civil service employees.

A summary follows showing a comparison of contract versus in-house costs for the contract year ended in fiscal year 1966 and our estimate of savings.

	Computation Laboratory	Astrionics Laboratory	Propulsion and Vehicle Engineering Laboratory	Total
	(millions)			
Estimated annual cost to perform the work with contractor-furnished employees:				
Contractors' costs	\$5.6 ^a	\$6.4 ^b	\$10.4 ^c	\$22.4
Fee	.5 ^a	.6 ^b	.6 ^c	1.7
MSFC contract administration costs	.1	.1	.1	.3
Total	<u>\$6.2</u>	<u>\$7.1</u>	<u>\$11.1</u>	<u>\$24.4</u>
Estimated annual cost to perform the work with civil service employees:				
Salaries and fringe benefits	\$4.2	\$5.4	\$ 8.5	\$18.1
Personnel, payroll administration, and security clearances	.1	.2	.2	.5
Added cost to permit on-site work for services performed off-site by contractors (note d)		.1	.1	.2
Loss of tax revenue (note e)	.2	.3	.3	.8
Total	<u>\$4.5</u>	<u>\$6.0</u>	<u>\$ 9.1</u>	<u>\$19.6</u>
Estimated annual savings available through use of civil service employees, rather than contractor-furnished employees	<u>\$1.7</u>	<u>\$1.1</u>	<u>\$ 2.0</u>	<u>\$ 4.8</u>
Estimated savings as percent of cost of work with contractor-furnished employees	27%	15%	18%	19%

^a Represents contract costs for work performed during the contract year ended April 1966.

^b Represents annualizations of contract costs for portion of contract year 1966 after full staffing was achieved.

^c Represents contract costs less (1) a pro rata portion of these costs which is applicable to certain positions that would not be eliminated by conversion to a civil service staffing arrangement and (2) a pro rata amount of costs associated with a planned reduction in the laboratory's requirements for contractor-supplied personnel.

^d Represents the annual cost of providing suitable facilities on-site to accommodate the civil service personnel that will be needed to replace contractor-furnished employees working off-site in space provided by the contractor. In addition to the depreciation costs of buildings, furniture, and equipment, the amount includes the estimated costs of utilities, maintenance, custodial services, and interest.

^e Represents estimated Federal income taxes which would be paid by corporations or other business entities providing products or services. This Federal income will be foregone if the work is done by civil service employees, and it is therefore considered as a Government cost.

In developing the estimated cost of performing the work with civil service employees, we based our calculations on (1) staffing plans prepared at our request by MSFC laboratory officials, showing the number and grade level of civil service employees who would be required to perform the laboratories' functions and (2) civil service salary rates and fringe benefits in effect at the time of our review. With regard to the staffing plans, the indicated reduction in the number of personnel which could be achieved by complete civil service staffing of the laboratories is summarized as follows:

	Computation Laboratory	Astrionics Laboratory	Propulsion and Vehicle Engineering Laboratory	Total
Staffing at the time of our review:				
Contractor employees	501	543	859 ^a	1,903
Civil Service employees	175	980	821	1,976
Total	676	1,523	1,680	3,879
Complete civil service staffing	635	1,491	1,627	3,753
Reduction	41	32	53	126

^a Net after exclusion of (1) 35 employees engaged in testing services that normally would be obtained under contract and (2) a planned reduction of 89 employees by the laboratory during fiscal year 1967.

Of the total indicated reduction, 112 involve supervisory or administrative personnel; a factor which, in our opinion, indicates that the employment of support service contractors results in a degree of supervision and administration which is not essential in carrying out the missions of the laboratories.

MSFC cost studies—We were advised by a responsible MSFC official that, in the initial decision to continue the use of support contractors to provide necessary engineering and related technical support services, no consideration was given to the relative costs of this method of staffing and of the alternative civil service staffing.

After most of the 11 contracts had been awarded, NASA Headquarters initiated six studies of the relative costs of obtaining certain support services at MSFC by contract and by civil service employees. Three of these studies, which were conducted in late 1965 and early 1966 by a national certified public accounting firm, involved engineering and related technical support services in three MSFC laboratories and offices.

The studies concluded that the engineering and related technical services could be obtained more economically if contractor-furnished employees were replaced with civil service employees. The results of the studies are summarized as follows:

	Computation Laboratory	Test Laboratory	Facilities and Design Office	Total
	(millions)			
Estimated annual cost to perform the work with contractor-furnished employees (note a)	\$8.0	\$4.9	\$9	\$13.8
Estimated annual cost to perform the work with civil service employees (note a)	6.8	4.7	.8	12.3
Estimated annual savings available through use of civil service employees rather than contractor-furnished employees	\$1.2	\$.2	\$.1	\$ 1.5
Estimated savings as percent of cost of work with contractor-furnished employees	15%	4%	11%	11%

* These amounts are exclusive of certain items shown in the NASA study as common costs, which would remain unchanged under each staffing method.

Only one MSFC facility—the Computation Laboratory—was involved in both the NASA cost studies and our review. The NASA cost study relating to the Computation Laboratory showed net savings of about \$1.2 million if civil service employees were used; whereas, our study

showed net savings of about \$1.7 million, or about \$500,000 more.

Our analysis indicates that the difference is attributable primarily to use in the NASA study of (1) an estimate of the cost of performing the work with contractor-furnished employees based on costs incurred in a 6-month period and annualized for the contract year; whereas, we used costs billed by the contractor for services performed during the contract year ended in 1966 and (2) a civil service staffing plan derived through discussion at the section or unit level within the Computation Laboratory; whereas, we used a staffing plan furnished to us by the Chief of the Laboratory's Resources Management Office.

In any event, although a difference may exist, the significant fact, in our view, is that these studies indicate the availability of substantial savings to NASA through the use of civil service employees.

A further discussion of the above, other NASA cost studies, and the agency's evaluation of the studies is included in this report starting on page 29.

Agency comments with respect to MSFC and our evaluations thereof—NASA's Assistant Administrator for Industry Affairs, by letter dated April 20, 1967, commented on our calculations concerning the contracts we reviewed at MSFC. The pertinent comments are quoted below, along with our evaluations thereof.

“With regard to the comparative cost factors at MSFC, part of the work performed by the support contractors was performed on-site in government facilities, but part was performed off-site in the contractors' own plants. A different accounting base is used to fix overhead costs for these off-site operations, since no overhead support is provided by the government; while some support of this type is furnished for the on-site operations. This off-site work was excluded in GAO's analysis of the GSFC contracts, but was included in

their MSFC analysis. We believe that this element should be recomputed for MSFC.

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"The GAO cost comparison did not give consideration to the additional Government-owned or leased facilities which would be required if the work performed off-site by two of the contractors were performed instead by civil service personnel. The GAO representatives have advised us informally that they plan to modify their report to bring out this factor."

As stated by NASA, our estimates of costs, as presented to NASA, did not give full recognition to the above factors. We therefore met with MSFC officials and obtained data regarding the overhead rates for on-site work and the additional costs that would be incurred to provide suitable space to enable the work that had been performed by contractor employees at off-site locations to be performed on-site by civil service employees. After evaluating the data, we adjusted our cost comparisons by decreasing the cost of a contractor operation and increasing the cost of a civil service operation. The net effect of these adjustments was a reduction of the estimated savings by about \$400,000, and our computation on page 9 has been adjusted accordingly. Although the MSFC officials did not formally concur in our adjustment, they did not express any disagreement with the manner in which our calculations were prepared.

"The GAO cost studies assumed that all Civil Service personnel would be hired at step one of the grade, whereas . . . [the CPA firm] used step two in their studies. We believe that the use of step two is more realistic because NASA has for several years had to hire its technical personnel at above the entrance level. For example, during the period October 1965 to June 1966 the entrance level ranged from step seven for a GS-5 to step two for a GS-11. In addition, a sample of hires from other Government agencies indicates that the average at which they were hired by MSFC was step 2.5. Even using only step two, the cost

of Civil Service salaries for the three contracts would be approximately \$600,000 greater than shown in the GAO report."

Our calculations were based on the staffing plans prepared by the Chief of the Resources Management Office for each of the laboratories involved. For the Propulsion and Vehicle Engineering Laboratory, the staffing plan showed the number and grade level and the step in grade of civil service employees who would be required to perform the functions being carried out by the contractor. For the Astrionics Laboratory, the staffing plan generally showed only the number of employees and the grade level; although, in several instances, the data presented showed that, where a step other than step 1 had been considered for a specific grade, laboratory officials had generally revised the grade level upward to the next higher grade. For example, where a GS-10, step 3, had been considered for the position, the grade was changed on the staffing plan to GS-11.

The staffing plan for the Computation Laboratory showed only the number of employees and the grade, and not the step within the grade. The Laboratory official who prepared the plan advised us that this information was not given because the step level within a particular civil service grade at which individuals would be recruited to fill the positions would be contingent upon the length of time the individual had been in grade. This contention, of course, assumes that all new hirings would be made from existing civil service employees. We used step 1 of the grade in our calculations on the basis of the assumption that a substantial number of contractor employees would accept civil service positions and, as new employees, generally would be hired in step 1 of the grade.

For the Astrionics and the Propulsion and Vehicle Engineering Laboratories, the responsible officials appeared to have given consideration to the step of the grade as well

as the grade level, in formulating their staffing plans, and we have no basis for substituting our judgment for that of these officials. For the Computation Laboratory, because it does not appear that the same consideration was given to the step of the grade, we are inclined to agree with NASA that some adjustment may be necessary. The use of step 2 for this laboratory would result in an increase of about \$130,000 in the cost of a civil service operation, and our computation on page 9 has been adjusted accordingly.

"For the work performed . . . for the Computation Lab at MSFC, the assumption was made that if this work were to be taken over and performed wholly by civil service personnel the average salary for the civil service personnel would be approximately \$1,100 per year less than the current contractor work force. We do not believe that this is a valid assumption; particularly in the highly competitive market which exists for these scarce skills. NASA in the past has experienced great difficulty in hiring the people needed, and it is by no means certain that a civil service staff could have been obtained to perform this function. The increase in government salary costs to cover this \$1,100 disparity would amount to approximately \$500,000 per year."

NASA's comment, in our view, does not give recognition to the fact that the major portion of the estimated reduction of 41 contractor employees, involving salary and fringe benefit costs totaling about \$550,000, consisting of the higher salaried supervisory personnel who, according to the staffing plan furnished us, would not be required if the functions were performed by civil service personnel. Furthermore, because the contractor's staffing plan and the plan of the Laboratory do not coincide, we believe that the use of average salaries, in this instance, is not meaningful. Although a complete position-by-position analysis cannot be made, we did note that, in certain cases, contractor personnel would receive higher compensation than

civil service personnel would receive but that, in other situations, the reverse would be true.

"The GAO cost estimates for Civil Service performance do not include sufficient amounts for installation overhead. The only factors included in their estimates are personnel, payroll administration, and security clearance costs. Other personnel would undoubtedly have to be added to center administrative services in such areas as printing, graphics, supply, transportation, physical security, etc. This is particularly true for the work presently performed off-site, where all of these services are presently provided by the contractors and included in their overhead costs."

It is our understanding that, for on-site activities, the above services are being provided to the laboratories, including the contractors, by MSFC, generally through other support contractors. Therefore, the cost of these services should not change significantly, irrespective of whether a civil service or contract operation is involved. For the off-site contract effort, as indicated earlier, we have made an adjustment for these services, in line with NASA's views, in calculating the cost of the contractor operation.

"The GAO audit makes provision for contractor 'home office' general and administrative costs, but no provision is made for a similar NASA 'G&A' to cover its Headquarters administrative costs. The Department of Defense procedure on cost comparisons does provide for a 5% factor to cover this element of cost, and if a 5% factor were allowed on the MSFC contracts, an estimated \$900,000 of additional government costs would have to be included."

We discussed the use of such a factor with an official of the Bureau of the Budget, and were advised that a specific percentage was not included in Bureau Circular A-76 because it was considered that additional headquarters general and administrative costs would vary between agencies depending on the nature of the headquarters operation. This official also advised us that whatever factor is

used should be based on an agency's actual experience. He stated that in an agency where activities such as payroll and personnel administration are decentralized to field installations, there would probably not be as much of an increase in headquarters general and administrative costs as there would be in an agency where such operations were centralized.

NASA's activities, including payroll and personnel administration, are carried out on a decentralized basis, with the Headquarters providing general supervision and guidance. Considering the fact that the contracts that are discussed in this report involve support to the specific centers rather than Headquarters and recognizing the criteria furnished us by the Bureau official regarding centralized versus decentralized management, it is doubtful, in our opinion, whether there would be significant, if any additional costs at the headquarters level of NASA because certain engineering and related technical support services at a center are performed by civil service rather than contractor employees.

"The GAO cost estimates do not recognize any Government liability for the unfunded Civil Service retirement costs. According to published reports, this deficit is a very significant amount and represents some degree of Government liability for each civil servant hired."

Bureau of the Budget Circular No. A-76 does not provide for consideration of the unfunded accrued liability as an added cost to the Government but does require consideration of the Government's contribution of 6½ percent, which we have done.

The liability referred to by NASA first arose when the fund was established and employees were given credit for their prior service; subsequently, the amount of the liability has increased for various reasons, including liberalization of benefits and the fact that the Government's contributions were not, until recent years, equal to the employees'

contributions. Thus, it appears that the unfunded accrued liability would be applicable primarily to existing civil service employees, rather than to new hirings.

At the present time, the normal cost of the system for employees and the Government combined is 13.6 percent; whereas, the combined contributions of both equal only 13 percent of salaries. Even if the Government were to continue to bear the entire portion of the .6 percent deficit, the added cost to the Government for civil service performance would be relatively insignificant for the contracts under consideration.

Goddard Space Flight Center

The Goddard Space Flight Center—a field installation of NASA—was established in January 1959 with the transfer of four divisions from NASA Headquarters. This transfer was preceded by the transfer of several space research projects and their employees from the United States Naval Research Laboratory to the Vanguard, Space Science, and Theoretical Divisions of NASA. These elements were then designated to serve as the nucleus of the new Goddard Center.

GSFC currently has responsibility for the management of certain NASA unmanned space projects and worldwide tracking and data acquisition operations. To accomplish its responsibilities, GSFC is organized into six major Directorates—Administration and Management, Projects, Space Sciences, Systems Reliability, Tracking and Data Systems, and Technology.

As of June 30, 1966, GSFC had a total work force of about 6,625 persons, of which about 3,710 were permanent civil service employees, about 255 were part-time civil service employees, and about 2,660 were contractor employees.

Our review was limited to six contracts, under which 811 contractor employees were performing engineering and

related technical services in seven divisions and three laboratories. Except for the offices of the Assistant Directors for Projects and for Systems Reliability, these organizational components ranged across the full spectrum of the GSFC organization. A tabulation follows showing the personal makeup at June 30, 1966, of the organizational components, by Directorates, where we made our review.

<u>Organizational component</u>	<u>Total</u>	<u>Personnel</u>	
		<u>Service</u>	<u>Contractor</u>
Office of the Assistant Director for Tracking and Data Systems:			
Network Engineering & Operations Division	235	174	61
Information Processing Division	185	152	33
Advanced Development Division	150	96	54
Office of the Assistant Director for Administration and Management:			
Experimental Fabrication & Engineering Division	214	172	42
Office of the Assistant Director for Space Sciences:			
Laboratory for Space Sciences	346	164	182
Laboratory for Atmospheric & Biological Sciences	155	95	60
Laboratory for Theological Studies	107	100	7
Office of the Assistant Director for Technology:			
Spacecraft Technology Division	249	155	94
Spacecraft Integration & Sounding Rocket Division	430	221	209
Systems Division	262	193	69
Total	2,333*	1,522*	811*

* Excludes 13 contractor employees assigned to the Projects Directorate at June 30, 1966, and four at one of the contractor's on-site administration offices:

Prior to 1965, GSFC, to complement its civil service staff, obtained engineers and related technical support personnel under 21 open-end work order contracts. In August 1965, NASA awarded six contracts at a total estimated cost of \$22.8 million for engineering and related technical support services to be performed principally at its Goddard Space

Flight Center over a 3-year period. Of this amount, about \$19.9 million represents the cost of contractor-furnished personnel, contract administration, and fee. The remaining \$2.9 million represents common costs which would be incurred irrespective of whether the services were provided by contractor or civil service personnel. Therefore we have not considered these common costs in our analysis. In essence, the contracts provide that contractor-furnished personnel will perform designated in-house tasks at various Goddard laboratories and divisions.

Our comparison of contract versus in-house costs, for the 3-year period of the contracts, showed that, if the services involved were to be performed by civil service personnel, savings of at least \$1.5 million over the contract period, or about \$500,000 annually, could be achieved. A summary showing our estimate of savings follows:

	Spacecraft Integration and Rocket Division	Laboratory for Space Sciences	Fabrication & Engineer- ing Division, Systems Division, Laboratory for Theoretical Studies	Development Division, Information Processing Division, Network Engineering & Operations Technology Division	Laboratory for Atmospheric & Biological Sciences	Total
Estimated cost to perform the work with contractor-furnished employees (note a):						
Contractor costs	\$5,259	\$4,346	\$2,678	\$3,180	\$1,909	\$18,740
Fee	318	230	139	195	98	1,050
GSFO contract administration	56	46	28	34	20	198
Total	5,633	4,622	2,845	3,409	2,027	19,983
Estimated cost to perform the work with civil service em- ployees:						
Salaries and fringe benefits	4,893	4,094	2,589	2,949	1,739	17,500
Personnel, payroll administra- tion, and security clearances	143	114	74	80	52	501
Loss of tax revenue (note b)	153	110	67	93	48	504
Total	5,188	4,308	2,730	3,122	1,839	18,505
Estimated savings available through use of civil service employees rather than contractor- furnished employees	\$ 445	\$ 314	\$ 116	\$ 287	\$ 188	\$ 1,483
Estimated saving as percent of cost of work with contractor- furnished employees	7.9%	6.8%	4%	8.4%	9.3%	7.4%

a The estimated costs of contractor-furnished personnel are based on labor hours and average rates, overhead expenses, and general and administrative expense, negotiated by the contractors and GSFO. For purposes of computing this fee, we used the contracting officer's estimate of 5 percent of total contract costs.

b Represents estimated Federal income taxes which would be paid by corporations or other business entities providing products or services. This Federal income will be foregone if the work is done by civil service employees, and it is therefore considered as a Government cost.

Our computation of labor hours required for civil service performance was based on the labor hours negotiated by the contractors and GSFC for direct and indirect labor, reduced by 7 percent which represents a decrease in staffing requirements that we believe could be achieved by converting from a contract to a civil service effort. The basis for our opinion, that a smaller staff is feasible, is that such a decrease was, according to MSFC officials, feasible under similar circumstances at MSFC.

In this connection, we requested GSFC representatives to furnish us with staffing data generally similar to the data supplied to us by MSFC representatives. GSFC stated, in response, that "the studies if performed could be at least considered academic since they would not be representative of the manner in which GSFC arrived at its decision to contract for certain services." GSFC stated that, because of high priority work and the magnitude of effort involved (1.5 man-years), GSFC was not in a position to divert sufficient manpower to develop the "hypothetical staffing plans" requested by us.

In view of this position, we considered similarities of the organizations, contractual arrangements, and type of work required to be performed by contractor-furnished employees at both Centers and concluded that they were reasonably comparable to allow application of the MSFC factor to the GSFC situation.

GSFC cost studies—Prior to awarding these contracts, GSFC made studies which compared the costs of using contractor-furnished personnel with the costs of using civil service personnel for selected divisions at GSFC, using the proposals of three contractors. The studies showed that it would be about \$423,000 less costly to use contractor-furnished personnel than civil service personnel.

The estimates were generally developed in accordance with Bureau of the Budget criteria then applicable, which

provided for the development of cost on the basis of full costing rather than incremental costing. Our experience indicates that the use of incremental costing in such studies generally results in lower costs for a civil service operation. With the issuance of revised Bureau of the Budget criteria in March 1966, the results of these studies became obsolete data because incremental costing, which was the concept used in our study, was specified for use by the executive agencies in making future cost comparisons.

Agency comments with respect to GSFC and our evaluations thereof—On April 20, 1967, the Assistant Administrator for Industry Affairs commented on our calculations. His comments are quoted below, along with our evaluations thereof.

“The comments with respect to Marshall cost factors set forth above are generally applicable to Goddard as well. Additionally, we would point out that . . . [Bureau of the Budget] Circular A-76, section 7.b.3 states in part: ‘While no precise standard is prescribed . . . a “new start” ordinarily should not be approved unless costs of a Government activity will be at least 10 percent less than costs of obtaining the product or service from commercial sources.’ (A ‘new start’ includes establishment of an activity operated and managed by the Government which provides for the Government’s own use a product or service that is obtainable from a private source.) Assuming without conceding the correctness of the GAO cost comparison at Goddard, we find that the total estimated savings as a percent of cost of contract work would be 7.4% which is below the 10% standard in BOB Circular A-76, cited above.”

We believe that our discussions of NASA’s comments relating to our MSFC calculations are equally applicable to the situation at GSFC.

With respect to NASA’s comment regarding the 10-percent factor referred to in Circular No. A-76, we believe that

this factor is applicable primarily to situations which involve additional capital investment by the Government in order to undertake a new start and that it is in recognition of the risks inherent in the Government's commitment involved in a capital investment as well as the cost uncertainties associated therewith. Our belief is based on section 5 of Circular No. A-76, which lists the circumstances where it may be in the national interest for the Government to provide directly for the products and services it uses—specifically section 5.e quoted below.

“e. Procurement of the product or service from a commercial source will result in higher cost to the Government. A Government commercial activity may be authorized if a comparative cost analysis prepared as provided in this Circular indicates that the Government can provide or is providing a product or service at a cost lower than if the product or service were obtained from commercial sources.

“However, disadvantages of starting or continuing Government activities must be carefully weighed. Government ownership and operation of facilities usually involve removal or withholding of property from tax rolls, reduction of revenues from income and other taxes, and diversion of management attention from the Government's primary program objectives. Losses also may occur due to such factors as obsolescence of plant and equipment and unanticipated reductions in the Government's requirements for a product or service. Government commercial activities should not be started or continued for reasons involving comparative costs unless savings are sufficient to justify the assumption of these and similar risks and uncertainties.” (Italics supplied.)

The caveat mentioned above refers primarily to situations where the Government would have to invest in new facilities for a new start. As the contracts in question at GSFC involve situations where contractor employees are assisting a civil service staff in performing the work of a

Government laboratory or activity, and such work is performed in existing Government facilities, there is no need for additional capital investment by the Government for new facilities. Therefore, in our view, there is no need to give additional recognition, in the form of the 10-percent factor, to risks and uncertainties which will not arise.

Clarification of the applicability of the 10-percent factor, as well as other provisions of Circular No. A-76, are currently under consideration by the Bureau of the Budget on the basis of the comments and suggestions of various executive agencies and the General Accounting Office.

Legal aspects of contracts concerning employer-employee relationship referred to the Civil Service Commission— On the basis of our review, we believe that the contractual documents were drawn so as to avoid creating an employer-employee relationship between Government supervisors and contractor-furnished personnel, thereby providing compliance with applicable civil service laws. In the administration of the contracts, however, there were indications that certain GSFC actions were in essence creating an employer-employee relationship and, therefore, possible violations of the applicable laws.

Current contracts provide that the contractors shall furnish supervisory personnel. We were advised by certain GSFC officials that they believed using the contractors' supervisors to give instructions to the contractors' operating employees was detrimental to efficient operations and that GSFC officials often gave instructions directly to the contractor employees. Other officials advised us that they gave instructions through the contractors' supervisors, but expressed some degree of dissatisfaction with such arrangement because of the unavailability of the contractor supervisor at times or of possible misunderstanding in relaying instructions.

Certain GSFC officials stated that they could cause, and in some cases had caused, the removal of certain contractor employees. We were advised by certain GSFC officials that some of the employees provided by the contractors were not fully qualified for their positions and had to be trained by Goddard section heads. We noted that, in other instances, the contractors did not supply supervisory personnel as stipulated in the contracts.

On September 6, 1966, we brought these matters to the attention of the Civil Service Commission (CSC). In October 1966 we were advised by the General Counsel, CSC, that the Commission was conducting a survey of certain contract operations at GSFC and that the survey would be expanded to include the contracts included in our review.

NASA cost studies

During fiscal years 1965 and 1966, 22 cost studies were made of NASA support service contracts and in-house service operations, comparing the cost of performing the services using contractor personnel with the cost of performing equivalent services using Government civil service personnel. The studies included services such as engineering support, data processing, security guard, janitorial, documentation and information, supply, and operation and maintenance. Nineteen of the studies were made by a national certified public accounting firm under a NASA Headquarters contract and three were made by an in-house team of representatives from the Financial Management Division and the Audit Division of NASA Headquarters and a financial management representative of each installation where a study was performed. We have not made in-depth evaluations of these studies, except for the NASA study discussed on page 13.

According to the summary report prepared by NASA, the studies were made to obtain a broad range of findings relative to the cost of a variety of support services. Also the

report states that the studies were made because comparative cost is a factor for consideration by NASA management in deciding the source of products or services for its own use and because a reporting of the findings should be helpful in evaluating the economics of contracting for support services and in answering questions on this subject which may arise, both within and outside NASA.

In summarizing the findings, the report states that the cost studies reveal that it would be less expensive to continue nine of the contracts than to perform the operations in-house; in the other 13 cases, it would be less expensive to perform the operations in-house.

The report states that a sampling of only 22 of the approximately 300 NASA support service contracts was considered too small to provide a positive basis for forming specific conclusions as to the economics of contracting for certain types of operations versus performing them in-house with NASA personnel. The report, however, offered some general conclusions and observations concerning the study findings. These conclusions and observations, as stated in the report, follow:

- “a. Generally, the labor costs and related fringe benefits of civil service personnel are higher than contractor employees. This is particularly true in the lower skills. The fringe benefits of contractor employees range from none to those which are fairly liberal, especially where employees are unionized, but the most liberal are lower than those of the Government. Because of the liberal holiday and leave allowances of the Government, it frequently is necessary to have more employees in-house than otherwise would be the case under contract—merely to match the productive hours of contractor employees.
- “b. From an economics standpoint, the higher Government labor and related fringe benefits cost is sometimes sufficient to ‘tip the scale’ from an in-house

operation to a contractor operation. However, this is true only where the Government has a 'tight' contractual arrangement. Where a contractor's overhead costs are excessive or where the Government's contract administration costs are unusually high, an in-house operation may be less expensive, despite the higher labor and fringe benefits cost of the Government.

- "c. Where an operation or activity involves wide fluctuations in workloads, it is probably less costly to have the operation under contract, primarily because of the inability to rapidly expand and contract a civil service staff, and the greater ability of contractors to do so, often on a weekly or more frequent basis.
- "d. Generally, non-technical services costing less than one million dollars a year are less expensive to contract than to perform in-house. This is due primarily to higher in-house costs for direct labor and fringe benefits. Six out of eight studies of non-technical services costing less than one million dollars a year indicated it was less expensive to contract. Conversely, all five studies of non-technical services costing more than one million a year (the range was 1.3 million to 19 million) indicated that it was more expensive to contract. No conclusions are drawn from this, because three of the five studies are borderline cases.
- "e. Services costing one million or more a year, whether technical or non-technical, are usually less expensive to perform in-house. All eight studies falling into this classification indicated that it would be less expensive to perform the services in-house, but four were borderline cases.
- "f. No definitive unvarying pattern emerged as a result of the 22 studies. Therefore, whenever cost is a prime factor in determining whether to contract for a given service or perform it in-house, a cost comparison study must be made.

*Conclusion, agency comments,
and our evaluations thereof*

We believe that the results of our review clearly indicate that savings of some significance can be achieved at MSFC and GSFC if the services covered by our review are carried out by civil service employees rather than contractor personnel. Also, assuming that the results of NASA's cost studies were reasonable, it appears that additional savings could be achieved by NASA at MSFC and other centers.

By letter dated April 20, 1967, the Associate Administrator for Organization and Management provided us with NASA's comments on our findings and conclusions. As a general justification for the use of contractor personnel, the Associate Administrator stated, in essence, that the rapid development of the civilian space program had, from its inception, required the extensive use of support service contracts to accomplish assigned objectives.

We were informed by the Associate Administrator that NASA's policies and practices in contracting out were well known and had been discussed with cognizant segments of the legislative and executive branches involved in both the substantive and fiscal review of NASA programs. He stated also that these policies are consistent with the policy direction in Bureau of the Budget Circular No. A-76, which reaffirms the Government's basic policy of relying on the private enterprise system for performance of its delegable needs. The Associate Administrator stated that there are factors and considerations other than costs which were and continue to be of a major significance in determining whether to contract for services. These factors are:

- "1. Continuation of the management competence and experience represented by contractor work forces.
- "2. Use of contractor services as specified in BOB Circular A-76 and its predecessor document.

- “3. Use of the stable civil service work force for those types of jobs which are necessary to establish government requirements, direct all work effort, and protect the government's interest.
- “4. Recognition of the long-term and short-term advantages of greater flexibility of contractor work forces to fluctuations in workload level, or shifts from one area to another.
- “5. Recognition that scarce skills, such as computer programmers, could best be obtained in a rapidly changing technological area through support contractors.”

Although recognizing that we gave consideration to these factors in presenting our conclusions, the Associate Administrator stated that, in the situations discussed in our report, these factors support NASA's decision that contracting for the services involved was in the best interest of the Government.

The Associate Administrator stated further that the material provided to us, in regard to our calculations of the relative costs of providing services, indicated that the difference in the cost of contracting for services and having them performed by civil servants was considerably less than we had stated in our draft report. After evaluating this material and adjusting our calculations where warranted, our calculations, as shown in the earlier sections of this report, still indicate that substantial savings would result from having the work involved performed by civil service personnel.

We have no basis for questioning the Associate Administrator's views regarding the need for such services in carrying out the objectives of its rapidly developing program or his views regarding the significance of factors other than cost in the determination to contract for services. We recognize that, because of changing objectives or requirements, NASA, as a practical matter, would prob-

ably have to continue to depend to some degree on support service contracts.

Although we recognize the possible merit of those considerations, it is our view that NASA's policies relating to the use of such contracts have not been sufficiently clear as to the consideration which should have been accorded to relative costs in determining whether contractor-furnished or civil service personnel should be used.

In any event, we believe that, in contrast to its past rate of growth, NASA has now achieved a relative degree of stability and should be able to better consider relative costs in assessing the extent to which it should continue to rely on the use of support service contracts. In this regard the Associate Administrator advised us that the agency recognized the need for more specific guidance on cost considerations and that such guidance would be part of any redefinition of policy resulting from a current review of agency experience in the use of support service contracts.

It is our view that in future situations, assuming that pertinent Civil Service Commission rules and regulations have been complied with, NASA should make a determination as to whether effective performance could be achieved by either civil service personnel or contractor-furnished personnel. If it is determined that effective performance could be achieved by either means, we believe that NASA should then make a detailed cost comparison of contractor versus in-house performance of such work. Thus NASA, with both qualitative and quantitative data, should generally be able to make its decision on the basis of economic considerations.

*Matter for the consideration
of the Congress*

Because the action to fully correct the situation discussed in this report would require a significant change in

NASA's policy relating to the use of support service contracts and because of the potential effect that a significant change may have on NASA's civil service personnel requirements, the Congress may wish to consider the policy aspects of this matter in further detail with NASA officials. The Congress may wish also to explore with NASA the impact that cost considerations should have in determining whether to use contractor or civil service personnel in those cases where either contractor or civil service personnel could carry out the operation equally well.

EXHIBIT D TO THE COMPLAINT**OPINION OF THE GENERAL COUNSEL**

United States Civil Service Commission
October 1967

**UNITED STATES CIVIL SERVICE COMMISSION
OFFICE OF THE GENERAL COUNSEL
OPINION OF THE GENERAL COUNSEL
LEGALITY OF SELECTED CONTRACTS
GODDARD SPACE FLIGHT CENTER
NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION**

INTRODUCTION*History*

Late in 1962 and early 1963, the General Accounting Office and the Civil Service Commission had occasion to look into the operation of a contract which Goddard Space Flight Center had entered into with a private firm, Consultants and Designers, Inc., under which the contractor furnished Goddard with the services of technical writers, illustrators, proofreaders, editors, and typists. Both the Commission and the General Accounting Office found that the method used by Goddard in employing personnel under contract resulted in a violation of the civil service and classification laws.

Officials at Goddard were made aware that both the Commission and the General Accounting Office considered that the services performed by these contractor employees were personal services; that personal services necessary to perform a Government function are for performance by regular employees of the Government appointed and compensated in accordance with the civil service and classification laws; and that in the absence of specific authority a

Federal agency is not authorized to contract for personal services without regard to the personnel laws applicable to Federal employees generally.

Goddard officials were informed of the basic criteria which the Commission applies in determining whether an employer-employee relationship exists between an individual and the Government, namely, whether the individual is (1) engaged in the performance of a Federal function under authority of law or an Executive order; (2) appointed or employed by a Federal officer; and (3) subject to the supervision and direction of a Federal officer or employee while engaged in the performance of the duties of his position. (These criteria for Federal employment are now codified in section 2105 of title 5, United States Code.) Goddard officials were also advised that when positions are created they must be filled in accordance with the civil service laws, unless specific authority permits otherwise.

At that time, officials of the National Aeronautics and Space Administration (hereinafter NASA) assured the Commission that corrective action would be taken and in April 1964, the agency issued a statement of policies and procedures for the guidance of its managers (NPC 401, April 1964, "Policies and Procedures for Use of Contracts for Nonpersonal Services").

In October 1965, as a result of Congressional inquiry and employee complaints, the Commission again questioned the propriety of contracting practices at Goddard. To resolve the matter the Commission and NASA undertook a joint study of seven contracts which were selected as representative. These were contracts with:

- (1) J.H. Lawrence Company of Baltimore, Maryland, at an estimated cost of \$2,066,557 for the maintenance of grounds, buildings, and stationary equipment. (The term was two years.)
- (2) Kane Transfer Company of Tuxedo, Maryland, at an estimated cost of \$1,225,341 for maintenance

services, warehousing, pick-up and delivery of passengers, sorting and delivery of mail, drayage, binning and issuing of stock material, and related functions. (The term was one year.)

- (3) Sperry Gyroscope Company of Great Neck, New York, at an estimated cost of \$3,507,305 for engineer support services consisting principally of the operation and maintenance of test equipment. (The term was two years.)
- (4) Melpar, Inc. of Falls Church, Virginia, at an estimated cost of \$2,211,447 for technical services in design, testing, drafting and fabrication functions. (The term was two years.)
- (5) Aerojet General Corporation, Inc. of Azusa, California, at an estimated cost of \$71,300 for the operation of the Center's occupational medical health unit and programs. (The term was one year.)
- (6) Thorion, Inc. of Adelphi, Maryland, at an estimated cost of \$112,932 for operation of Xerox and related equipment. (The term was 3 months with the option to extend for 9 more months.)
- (7) Allen & Mitchell Company of Washington, D.C. at an estimated cost of not to exceed \$2500 for services, labor, material and equipment to remove, repair, and replace parts on boiler and other mechanical equipment. (The term was one year.)

After study, the Commission and NASA headquarters informally advised Goddard officials that some corrective measures might be required. As a result, the Allen & Mitchell contract was modified, the part found objectionable was awarded to another contractor, and Goddard management took action seeking to correct the undesirable characteristics of other contracts.

During this period, General Accounting Office auditors questioned the legality of certain contracting practices discovered in the course of an audit of Goddard operations. Without making a full study of the facts, the General Accounting Office on September 6, 1966 referred six contracts to the Commission for determinations of legality. These contracts were:

- (1) Electro-Mechanical Research of College Park, Maryland, to provide 150 man years of technical support services to the Spacecraft Technology, Division at an estimated cost of \$1,540,300.
- (2) Consultants and Designers, Inc. of Arlington, Virginia, to provide 108 man years of technical support services to the Laboratory for Atmospheric and Biological Sciences at an estimated cost of \$1,110,800.
- (3) Lockheed Aircraft Corporation, Lockheed Electronics Company Division, of Clark, New Jersey, to provide 223 man years of technical support services to Network Engineering and Operations Division at an estimated cost of \$3,038,770.
- (4) Fairchild-Hiller Corporation of Rockville, Maryland, to provide up to 392 man years of technical support services to the Spacecraft Integration and Sounding Rockets Division at an estimated cost of \$4,693,065.
- (5) Vitro Engineering Company, New York, New York, to provide 308 man years of technical support services to the Laboratory for Space Sciences at an estimated cost of \$2,898,360 which was later increased to \$3,442,360.
- (6) Melpar Inc., referred to above.

The Commission decided that a complete review of these contracts would be undertaken in connection with an overall inspection of NASA personnel practices. Since it appeared that all six contracts were basically similar in form

and operation, the Commission decided to make an in-depth survey of two representative contracts.

In its letter referring the six contracts to the Commission, the General Accounting Office indicated that its review of the contracts was being directed principally to a comparison of the economic aspects of performing in-house tasks with contractor-furnished personnel rather than civil service employees. However, the letter stated that the contracts and operations under the contracts had been reviewed to determine whether they met the intent and authority provided by the Civil Service Act and related statutes, using the criteria expressed by the Commission's General Counsel in his letter of February 12, 1965, relating to the use of contractor-furnished personnel at Fuchu Air Base. This review raised "sufficient questions to warrant our bringing this matter to your attention for consideration of a review to be undertaken by the Commission."

Subsequently, in a report to Congress, dated June 1967 (B-133394), the General Accounting Office concluded that significant savings could be achieved if the services in question were carried out by civil service personnel rather than by contractor personnel. The report also indicated the General Accounting Office's belief that the contracts were drawn so as to avoid an employer-employee relationship; that operations under the contracts indicated possible violations of the civil service laws; and that these matters had been brought to the attention of the Commission.

NASA contends that General Accounting Office has the final authority to decide the legality of contracts, that the report to Congress indicates that General Accounting Office has decided that the contracts are legal, leaving only for consideration certain actions that may have digressed from the terms of the contract.

We see no necessity for a discussion of the authority of the General Accounting Office vis-a-vis that of the Civil

Service Commission to decide that a contract is illegal because it contravenes the civil service laws. It is clear from the discussion in the report to Congress under the heading "*legal aspects of contracts concerning employer-employee relationship referred to the Civil Service Commission*", that the General Accounting Office has made no decision on this point. Consequently, in this opinion we will consider the legality of the contracts with respect to their terms, as well as with respect to operations carried on under them.

Civil Service Commission's Responsibilities

The Commission's authority and responsibility to interpret and administer the personnel laws to effectuate their purposes have long been recognized by the Attorney General, by the Congress, and the courts. See H.R. Rep. No. 188, 89th Cong., 1st Sess. (1965), and authorities cited therein; see also *Born v. Allen*, 291 F.2d 345 (D.C. Cir. 1960); *Adelstein, et al. v. Macy, et al.*, 265 F.Supp. 171 (E.D. N.Y. 1967).

A statement of the requirements, purposes, and national policies which are prescribed by the personnel laws is set forth in Appendix A. As stated in this Appendix, it has been the Civil Service Commission's experience that the procurement and use of personnel by unauthorized contracting practices have an adverse impact upon the civil service system and tends to frustrate the purposes and national policies expressed by the personnel laws. The extensive use of contractor-supplied personnel for the performance of Government missions poses issues of critical importance to our system of government, to any meaningful concept of "public service" and to the continuing vitality of the civil service system.

Our experience with contracting practices across the Executive Branch convinces us that these practices deserve thoughtful analysis and evaluation to assay their effects

and implications to our governmental, economic, and social institutions.

The contracts under review present a clear example of the "interface" between what is presumed to be private enterprise on the one hand, and government operations on the other. This dichotomy appears upon analysis to be more theoretical than real in many segments of the aerospace field.¹ The exercise of government authority, the management and control of government programs, the limits of official responsibility and of governmental liability in contract and tort, may all be critically affected by the actual employment status of contractor-supplied personnel. These contracts exemplify the need for greater definition and understanding of the status of contractor-supplied personnel and of the criteria and rationale by which that status is determined. At stake are potentially massive claims upon the Treasury of the United States.

There is nothing novel in the rule that a contract is illegal if either its formation or its performance is prohibited by statute. The statutory prohibition may be express, or implied from the purpose of the statute (*Restatement of the Law, Contracts*, § 580); *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961). So, in *Montana-Dakota Utilities Co. v. Williams Electric Cooperative*, 263 F.2d 431 (8th Cir. 1959), the court held a contract dividing territory invalid because contrary to public policy. The rule is applicable as well to the United States; *Air Transport Associates v. United States*, 221 F.2d 467 (9th Cir. 1955). "A government corporation (TVA) should advocate no intention contrary to law in executing con-

¹ "It is time to recognize that the developments of the past decade have obliterated the clear-cut boundary which once separated government employees from the employees of private organizations. The purely legal distinction still exists, but in many cases there are simply no longer any functional differences. * * *" J. Johnson, General Counsel, NASA, *THE EXPANDING ROLE OF CONTRACT IN THE ADMINISTRATION OF RESEARCH AND DEVELOPMENT PROGRAMS*, Geo. Wash. L. Rev. (April 1963).

tracts." (*City of Tullahoma, Tenn. v. Coffee County, Tenn.*, 204 F.Supp. 794, 800 (E.D. Tenn. 1962)).

Any determination concerning the contracts under review that we may make is strictly for the purposes of administering the personnel laws within the Executive Branch, for the guidance of NASA and other agencies, and in response to the request from the Comptroller General. We are not attempting to determine the employment status of any given individual or group of individuals under the contracts. Nor do we purport in any way to affect or resolve private rights or Government liabilities under the contracts.

CONTRACTS REVIEWED

Contract Provisions

The two contracts selected for in-depth survey were the Melpar contract and the Electro-Mechanical Research (hereinafter EMR) contract. They represent a type that is in general use by NASA for procuring on-site technical support services of various kinds. Because they are representative and because their administration was typical, the conclusions reached concerning them apply equally to contracts of the same type administered in the same general manner.

Many of the provisions of the contracts are identical. These will be set out below, as will the provisions that apply exclusively to each contract.²

Provisions applicable to the Melpar Contract only

This is a "cost-plus-award fee" contract for "engineering, design, and fabrication services" on-site at Goddard, at the "Level of Effort" specified, at an estimated cost of \$2,168,086 and a "Fixed (base) Fee" of \$43,361. The

² See Appendices B and C for full text of these contracts, less standard clauses incorporated by reference.

award fee, depending upon performance, may range from nothing to \$130,080.

The Level of Effort clause specifies that the contractor shall furnish "a total of 216 direct labor man years" (1920 direct labor man hours constitute one direct labor man year) during the two-year period of the contract. If the 216 man years are not utilized within two years, the contracting officer has the option to extend the contract period for 12 months, without adjustment in the fixed (base) fee.

The contracting officer also has options to increase the level of effort, if the 216 man years are consumed in less than two years, by requiring 2080 direct labor man hours per man year in lieu of the 1920 labor man hour year specified in the contract. Under this option the estimated total cost is increased by \$174,202 and is subject to an award fee of \$10,452. This option also applies during the one-year option period. In addition, the Government is given a right to extend the contract for one year beyond the two-year term and to require the contractor to furnish not to exceed 87 more man years of direct labor, at an estimated cost of \$880,813 and a fixed (base) fee of \$17,616. This option is subject to an award fee of up to \$52,849.

The contract estimates the average monthly rate of effort at 108 man months and provides that the contractor cannot be required "to furnish in excess of 135 man months, in any one month, without the contractor's consent."

The "Statement of Work" incorporated into the Melpar contract is similar to that in the EMB contract. It provides for services to each of the two divisions and the laboratory supported and contains a general provision with respect to providing other services "required to accomplish the NASA mission assigned to the subject Division." The specification of the type of work under the various general categories includes:

- Assist in planning and establishing fabrication schedule

- Assist in preparation of process specifications and technical reports
- Assist with the development of experimental approaches, and
- Assist in performing chemical analysis and the evaluation of results of experiments

Provisions applicable to the Electro-Mechanical Research Contract only

This is a "cost-plus-award fee" contract for "scientific and engineering services" on-site at Goddard, at the "Level of Effort" specified at an estimated cost of \$1,510,100 and a "Fixed (base) Fee" of \$30,200.

The award fee depending on performance may range from nothing to \$90,608. The Level-of-Effort clause specifies that the contractor shall furnish "a total of 150 direct labor man years" (1912 direct labor hours constitute one direct labor man year) during the two-year term of the contract. If the 150 man years are not utilized within two years, the contracting officer has the option to extend the contract period for 12 months without adjustment in the fixed (base) fee.

The contracting officer also has options to increase the level of effort, by requiring 2080 direct labor man hours per man year in lieu of the 1912 labor man hour year specified in the contract. Under this option, the estimated total cost is increased by \$132,700, and is subject to an increase in award fee of \$7,960 for the two-year period. In addition, the Government is given a right to extend the contract for one year beyond the two-year term and to require the contractor to furnish not to exceed 60 more man years of direct labor, at an estimated cost of \$604,050 and a fixed (base) fee of \$12,080. This option is subject to an award fee of up to \$36,240.

The contract estimates the average monthly rate of effort to be 75 man months and provides that the contractor cannot be required "to furnish in excess of 94 man months, in any one month, without the contractor's consent."

The "Statement of Work" incorporated into the EMR contract specifies that services "shall include but not necessarily be limited to" three specified categories of service. Each category has specified sub-categories including a clause calling for the provision of "associated services." The general clause of over-all applicability provides: "In addition, the contractor may be required to perform other scientific and engineering support services required to accomplish the NASA mission assigned to present GSFC Division known as the Spacecraft Technology Division."

Provisions common to both contracts

Performance under each contract is subject to an "ordering procedure" under which the contracting officer unilaterally issues "task and sub-task assignments" which designate, "(a) the task to be performed, (b) the schedule of performance, and (c) any other pertinent information, that is, reports, overtime, performance area, materials, or travel authorized." Except for an emergency or "initial assignment", task assignments are to be given the contractor 15 days prior to the task commencement date. Additional task assignments issued on the same job number are called sub-task assignments. The contractor is required to submit for each task assignment and supplement thereto, his over-all estimate for completion of the task, including, by month, required man hours by labor category and skill level and total dollar costs, including travel, materials, etc.

The contractor must also submit by the tenth of each month preceding the month in which the work will be performed, a task schedule, estimating man hours, skill levels, and labor categories, identifiable in the contractor's wage and salary

plan, necessary to fulfill each task or sub-task to be worked on in the upcoming month. This schedule is approved by the "Technical Division Chief and Contracting Officer" and returned to the contractor by the 15th day of the month in which submitted.

Each of these contracts provides that the work required under task assignment "shall be subject to the technical direction and surveillance of the GSFC Support Contract Coordinator (SCC) and technical representatives if one is designated."

"Technical direction" is defined in each contract as "direction to the contractor which fills in details, requires pursuit of certain lines of inquiry, or otherwise serves to accomplish the contractual statement of work." Technical directions and surveillance to be valid must be consistent with the general scope of work and terms and conditions of the contract.³

Both contracts significantly incorporate a standard "Stop Work Order" clause which gives the contracting officer the unilateral right to require by written order that the contractor stop all or any part of the work called for by the contract for a period of 90 days after delivery of the order to the contractor and for any further period to which the parties may agree. Also, the contracting officer may terminate the work covered by such order as provided in the Standard Termination Clause.

Contractor employees are required to work the same days and hours as employees of the division or laboratory to which they supply services. They are excused due to bad weather, or hazardous conditions the same as Federal

³ "Technical direction" is also defined in a Conflicts of Interest article in the contracts as follows: "The term 'technical direction' includes a combination of substantially all of the following activities: preparation of work statements for contractors, determinations of parameters, direction of contractor's operations, and resolutions of technical controversies." (Art. XXXVII, Melpar; Art. XXXVI, Electro-Mechanical Research)

employees without loss to the contractor. Exceptions are provided for shift work and for nongovernmental holiday pay rates.

The contractor agrees to use Government-furnished facilities, materials and equipment when the Government considers it to be to its advantage; to obtain the prior consent of the Contracting Officer before obtaining materials and equipment that are not obtainable from Government sources, the consent to be in writing if the procurement is valued at \$2500 or more; and to support his indirect labor by furnishing "labor-saving devices," such as typewriters, etc., and office furniture, such as desks, chairs, etc.

Each contract provides that a "Project Supervisor" shall be the contractor's "authorized supervisor for technical and administrative performance to all work assignments made hereunder." The contractor is also required to maintain an office at Goddard Space Flight Center for the purpose of "supplying the required supervision and direction."

Each contract provides that contractor-furnished personnel shall be "competent to perform the work prescribed hereunder", and "under the control of the contractor." The contractor is made responsible for the conduct and integrity of its employees and "for taking such disciplinary action with respect to its employees as may be necessary."

The Government agrees to "assist in the orientations and familiarization programs" for the initial crew in each task area. Thereafter, the contractor is responsible for "providing trained people to fill vacancies or to support increased requirements."

The contractor agrees to participate as an advisor "in technical review teams assessing the status of assigned projects."

Under a "Change Over" article the contractor acknowledges the possibility of being replaced by a Successor Contractor in the performance of the work prescribed and

recognizes the "importance to the Government of retention of personnel experienced in the work provided herein." The contractor agrees, if replaced, to "cooperate to the extent necessary to facilitate uninterrupted support of the Goddard organization . . ."

Publication of technical papers by contractor personnel are subject to the prior written approval of the SCC.

With respect to payment for services, each contract provides that vouchers covering performance must be submitted and paid monthly with the time period covered by the voucher corresponding to the monthly task schedule. The Government can require at its option that the voucher be supported by "a breakdown of labor costs by category, skill level, hourly rate, total hours worked and the names of the individual or individuals working on each task or sub-task assignment."

Overtime and Shift premium payments to contractor personnel must be given prior written approval by the contracting officer or his representatives.

The contractors will be reimbursed for travel in accordance with their established travel policies.

Subcontracts for direct labor must have the prior approval of the contracting officer.

Each contract has its own key personnel clause and also incorporates a standard Key Personnel Clause, No. 127.⁴

⁴ 127. Key Personnel and Facilities (March 1963). The personnel and/or facilities specified in the schedule attached to this contract are considered to be essential to the work being performed hereunder. Prior to diverting any of the specified individuals or facilities to other programs the Contractor shall notify the Contracting Officer reasonably in advance and shall submit justification (including proposed substitutions) in sufficient detail to permit evaluation of the impact on the program. No diversion shall be made by the Contractor without the written consent of the Contracting Officer; provided that the Contracting Officer may ratify in writing such diversion and such ratification shall constitute the consent of the Contracting Officer required by this clause. The schedule attached to this contract may, with the consent of the contracting parties, be amended from time to time during the course of the contract to either add or delete personnel and/or facilities as appropriate.

Key Personnel named by the Contractor to perform work required by the contract shall not be changed from one key position to another during performance of the contract without the consent of the SCC. Likewise, should anyone listed among the key personnel choose to relinquish his services with the contractor, the contractor shall immediately replace him with a person whose talent is sufficient to take over the assigned project or mission without delay in the performance of the work. The key personnel are specified in the Melpar Contract by name and position as follows:

<u>Position</u>	<u>Personnel</u>
Manager (Project Supervisor)	Dr. Ambrose
Administrative Assistant	H. Blackburn
Supervisor, Ex. Fab. & Engineering Div.	M. E. Garner
Assistant Supervisor, Ex. Fab. & Eng. Div.	C. Wotjunick
Supervisor, Systems Division	D. W. Sawtelle, Jr.
Design and Drafting, Systems Division	J. Blossom
Electronics, Systems Division	J. Wallen, Jr.
Data Processing, Systems Division	L. Lenstrom
Supervisor, Lab. for Theoretical Studies	W. Goodell

The Key Personnel are specified in the Electro-Mechanical Research Contract by name and position as follows:

<u>Position</u>	<u>Personnel</u>
Manager, Engineering	G. D. Linsey
Manager, Administrative	S. J. Teta
Project Supervisor	R. D. Laner
Supervisor, Space Power Branch	B. H. Lovejoy
Supervisor, Thermal Systems Branch	K. S. Brown
Supervisor, Flight Data Branch	R. D. Powers
Supervisor, Spacecraft Electronics Branch	P. J. Lawson

The "Incentive Award Fee" clause provides for quarterly evaluations of contractor performance. The Goddard Space Flight Center Director or his designated Fee Determination Official (FDO) makes the final determinations. The contractor is advised in writing why the fee was earned or why it was not earned in order that performance may be approved. The contract provides for an "Award Fee

Evaluation Plan" which sets up the general criteria for evaluations as follows:

1. Technical management
2. Performance of work
3. Utilization of NASA/GSFC Facilities and Equipment
4. Contract Administration

The Government is obligated to develop an evaluation plan which will elaborate upon the general criteria. Quarterly review meetings will be held with management of the contractor to review his current performance and discuss areas of possible improvement.

Under the Performance Evaluation Plan developed for each of these contracts the responsibility for qualitative evaluation of services is divided between the Business Coordinators for Business Management and "The Division Technical Coordinators for day-to-day operation and Technical Management of the contract * * *." Individual technical performance monitors are required to be appointed in each area receiving support by each division and laboratory served. Evaluation is to be on a "continual basis" with monthly reports being submitted to the Technical Evaluation Coordinator. Each plan also provides:

"Each Technical Evaluation Coordinator is expected to discuss with his contractor counterpart means of improving the operation and in all ways encourage the highest performance by contractor personnel. The contractor will be apprised of all deficiencies when noted and offered an opportunity to discuss the cause and corrective action to be taken."

Under the technical performance evaluation procedures, the contractor's performance will be "evaluated from a management, operation, and technical standpoint, with

emphasis on quality, quantity, timeliness and economical use of all resources." The plan provides examples of "Plus Events" and "Minus Events" for use in the evaluation process. One of four samples of "Plus" Events provided in the plan is—

"Proficiency of technical personnel consistently above expected level."

Examples of "Minus" Events are—

- "Late delivery or completion of task assignments";
- "Utilization of unreliable or faulty components resulting in test failures";
- "Inaccurate reliability studies, technical data, etc." and
- "Insufficient technical detail in drawings, tracings, reports and test data."

OPERATIONS UNDER THE CONTRACTS

The MELPAR Contract

Orders are placed against the 216 direct labor man years by Goddard issuing to the contractor individual Task Assignments "designating (a) the task to be performed, (b) the schedule of performance, and (c) any other pertinent information, that is, reports, overtime, performance area, materials, or travel authorized."

A task assignment is initiated by a divisional Technical Representative appointed by the division chief with the concurrence of the Contracting Officer. It is approved by the divisional Support Contract Coordinator appointed by the division chief. It is issued by the Contracting Officer in six copies: two to the contractor, one to the Contracting Officer, one to Financial Management, one to the division, and one to the originator.

On receipt of a task assignment the contractor prepares a task schedule showing the manning requirements by labor category, skill level, and estimated number of man hours. For continuing task assignments, this task schedule must be submitted for each month by the 10th of the preceding month. It is submitted in six copies. It is approved by the division chief or his Support Contract Coordinator, who retains copy 5 and forwards remainder to the Contracting Officer. The Contracting Officer approves the task schedule, retains copy 3, and sends copies to the Office of Resources Utilization (1) and the on-site Contractor Representative (2). On receipt of the copies, the contractor may begin performance.

Sub-task assignments under task assignments are issued by the same procedure as task assignments. Directions to the contractor for use of the staff provided under task or sub-task assignments are given by Technical Direction. The Technical Direction is prepared in six copies, by the Technical Representative, or the Support Contract Coordinator. One copy is for the contractor, one serves as an acknowledgment, one is for the Technical Officer's file, one is for the Contracting Office, one for the Management Analyst, and one for the Project Manager.

A task schedule in quintuplicate, as above, is submitted for each month by the contractor by the tenth of the preceding month and approved by the division chief or his Support Contract Coordinator and the Contracting Officer by the 15th. The contractor also submits a monthly progress report, one copy to the Negotiator, four copies to Technical Information Division, and twenty copies to the Technical Director. There is a minimum of one such report per division, and may be one for each task assignment. Also, by the 15th of the month following, the contractor must submit a Financial Management Report, with copies to the Financial Management Division, the Contracting Officer, the Office of Resources Utilization, and the division. Special Financial Management Reports may be required. In addi-

tion, the Financial Management Division prepares a monthly report to the division and the Contracting Officer. The contractor obtains reimbursement for services by submitting vouchers in seven copies monthly.

The contractor must furnish a Materials Report each six months. The report is in the form of a multilith master for reproduction, and covers, in summary form, experiments, developments, studies, and other efforts of the contractor relating to materials and their processing for use, conducted or planned, both positive and negative results. It must also report each subcontract of \$10,000 or more under its prime contract.

There is a Melpar Contract Manager and about eight Melpar supervisors who are on-site at the Center to supervise the performance of task assignments by the 133 contractor employees. We could not ascertain the exact number and type of contractor employees working in any one position or group of positions under the Melpar and EMR contracts. As a general rule, the following types of positions are staffed by contractor employees at Goddard: *trades and labor positions*, such as cement masons, laborers, welders, carpenters, mechanics, warehousemen, bricklayers; *technical support positions*, such as electronic technicians, electronic assemblers, and laboratory technicians; *programmers and statisticians*; *physical scientists and engineers*. The number in the last two groups is relatively small; the first two groups contain most of the contractor employees.

The performance of the work required under the task assignment is subject to the technical direction and surveillance of the Center's Support Contract Coordinator (one in each division). The contractor's performance under a "task assignment" is reviewed by civil service contract monitors under the direction of the contract coordinator. These contract monitors are not supposed to give "technical directions" or assign work to individual contractor

employees, but are told to give them to the Melpar supervisors, who, in turn, give the directions on the work to the contractor employees.

The contract provides for an award fee as an incentive to the contractor to furnish better than minimum performance. Minimal performance warrants no award fee; better performance is rewarded by a quarterly award fee.

Technical monitors prepare a technical evaluation report (to the Technical Evaluation Coordinator) and a business evaluation report (to the Business Evaluation Coordinator) each month. After considering these and the contractor's monthly progress reports (mentioned earlier) the Technical Evaluation Coordinator and the Business Evaluation Coordinator each make a quarterly report to the Performance Evaluation Board.

After considering these last-mentioned reports and the contractor's quarterly letter report (not previously mentioned), the Performance Evaluation Board prepares a recommendation to the Fee Determination Official, quarterly.

After considering the Board's report, the Fee Determination Official sets the award fee, which is recorded as a contract document.

The performance evaluation reports on many occasions discuss individual performance, e.g. "The newly assigned engineer on the job is proving to be a higher caliber engineer." "The quality of technician support is also proving to be a definite asset to the task." "The 25% rating is for bringing a new man in a month late and the person has little experience in the area of the task assignment." "The assigned illustrator has shown good initiative in preparing a set of charts." "On another task the contractor underestimated the difficulty of the task, inadequately staffed it, and a lengthy extension was necessary."

The Commission's inspection of actual operations under the contract shows that there is diversity in the administration of the Melpar contract in the different divisions.

In the Laboratory for Theoretical Studies the Melpar contractor supervisor supervises only in a general way in taking care of the administrative needs of the contractor personnel assigned to this division. There is a daily direct dealing ("interface") and commingling ("intermix") of the civil service scientists and the contractor technical assistants in the completion of the daily work. It seems to be the general practice of this laboratory to "short circuit" the Melpar contract supervisor and give the work to be done directly to the contractor technical assistants.

In the Projects Directorate, Melpar supplies only design and drafting services. In looking into the operation it is impossible by mere observation to differentiate between a civil service employee and a contractor employee unless one is close enough to see the individual's security badge. There are some instances where contractor and civil service employee work at desks next to each other.

The remaining two divisions, the Systems Division and the Experimental Fabrication and Engineering Division, make strenuous efforts to ensure that there is no "intermix" of contractor employees and civil service employees. Physical separation, within existing space limitations, to a large extent, has been achieved and is being maintained. However, there is occasional direct dealing between civil service employees and contractor technical employees. This is unplanned and occurs, for example, when a civil service engineer or scientist needs to clarify or explain the work required from rough sketches or notes, or when a sudden change is needed in the work being done.

Goddard has tried to ensure that both Government employees and contractor employees are aware of the fact that Government employees should not exercise super-

vision over contract employees, either directly or indirectly.

With only a few exceptions, the services performed by Melpar-furnished personnel are performed at Goddard Space Flight Center or in one of its outlying test facilities. The bulk of the work performed by Melpar under this contract is in supplying technicians with engineering and design experience to the divisions indicated.

Work being done at Goddard requires a high level of employee competence which is very seldom found elsewhere. Although some contractor-supplied personnel are initially qualified to support a function, many have only a basic skill, e.g., that of electronic or laboratory technician, draftsman, welder, etc., which is developed on the job into the high-skill level needed to perform in an aerospace function. Melpar admittedly provides no services that Goddard does not possess equal or superior competency to provide for itself.

Goddard officials have characterized the work done by contractor employees under the "task assignments" as being of a temporary or intermittent nature. Although in some cases an individual assignment may be of short duration, many will dovetail with previous and subsequent "task assignments" thus indicating a continuing need for these support services. The short term and intermittent work that is being done in these divisions is usually done on the basis of individual "technical directions" issued under each separate "task assignment".

On the whole, the evidence does not support the contention that the work done by contractor employees is temporary or intermittent. The need for the services performed by contractor employees is constant, continuing, and reasonably predictable; so is the manner in which this need is met by contractor employees. For instance, contractor employees are involved in operating highly complicated and expensive equipment that is solely the property of

the Center. Although individual tests which may be done in or by this equipment may be of short-term duration, there admittedly is a continuing future long-range need for these types of tests. The same characterization may be made of the design and engineering services which Melpar provides. There is, and will be, a continuing need for design and engineering support services of this type. Moreover, the workforce supplied by this contract is relatively stable. Our investigation indicates as little as a ten percent fluctuation over the contract term in the total workforce. The turnover rate for required skills is not established; however, we found a number of required positions which have not changed over the contract period.

The Electro-Mechanical Research Contract

The EMR contract is performed in very much the same manner as the Melpar contract described above, however, services are provided solely to the Spacecraft & Technology Division. Orders are placed against the 150 direct labor man years by the Spacecraft Technology Division issuing to the contractor individual task assignments.

The Commission's inspection of actual operations under the EMR contract shows that the contractor has as his primary function the responsibility of supplying technicians to support the Goddard scientific and engineering personnel. The civil service scientist or engineer, responsible for the developmental work of the division, is in constant need of competent technical help most of which is supplied by the contractor.

In operations under this contract, the civil service scientist, engineer, or technician retains the developmental portion of a project, and the contractor supplies the technical support personnel to continue a major part of the project in building and/or testing the product. Problems which arise in the contractor performed portion of a project must be solved by the civil service employee, either through

taking the work back for further development, or "technical discussion" with the contractor supervisor or contractor employee.

There was much more evidence of direct or indirect supervision by civil service employees of the day-to-day work of EMR contractor employees than under the Melpar contract. The degree to which Government employees supervise contractor employees ranges from one of strict compliance with contractual formalities to instances where the civil service monitor could make no distinction between the civil service technicians and the contractor technicians assigned to his section. All shades of difference are present, from no supervision through varying degrees of "interface" and "technical discussion", to admitted supervision of contractor personnel by the Government employees. In addition to the foregoing, the Commission found in part:

"First, the impossibility of physical separation, because of the prohibitive expense of duplicating equipment, brings many day-to-day interface situations and, consequently, many more chances for development of a supervisor-employee relationship.

"Second, there are a large number of one and two man EMR 'shops' in which it is not possible to assign group leaders. The unique specialities, across a broad range of disciplines, make it impossible for an overall contractor supervisor to have the knowledge required to give proper supervision to these employees. As a result, to save time and avoid the very real possibilities of misunderstanding and error, many government employees give assignments, usually orally, to the contractor employee and keep a close check on the work as it progresses.

"Third, some of the contractor employees have been working at their positions for up to 5 years, in many instances working for the same section doing the same

type of work for the same people for the whole period of time. The change in contractors has done little but change the name on their paycheck. These latter employees have developed with the jobs into being specialists of such a high degree that no [contractor's] 'general' supervisor could possibly direct them in their work."

Working space, supplies, and equipment are furnished contractor employees by Goddard. The only equipment and supplies furnished by EMR are office equipment and office and administrative supplies for its supervisory employees and their clerical assistants.

Like Melpar this contractor usually supplies people who have a basic skill, e.g. that of electronic technician, draftsman, welder, laboratory technician, etc., which is then developed into the skill level needed to perform in an aerospace function. In some instances fully qualified personnel are provided initially. The work being done requires a degree of employee competency seldom found elsewhere.

Like the Melpar contract, although many of the EMR task assignments are short in length, there are a large number of continuing functions that need to be done on a day-to-day basis. These are continuous in nature and the contractor employees doing these functions are usually not moved to other assignments except in case of emergencies. The Commission identified at least 45 jobs being done by contractor employees which are long-term continuing functions, which must be done whether they are done by a contractor employee or a civil service employee.

I. LEGALITY OF THE CONTRACTS UNDER THE PERSONNEL LAWS

Background

On February 12, 1965, in response to a request from the General Accounting Office, the General Counsel of the

Commission gave his opinion that a contract between the Department of the Air Force and Capehart Corporation to furnish technicians to work at the Fuchu Air Force Base in Japan resulted in a form of personnel procurement which was not authorized by law and which violated the personnel laws. That opinion was concurred in by the Comptroller General and reprinted in full in House Report No. 188, 89th Congress, 1st Session (1965). As established in that opinion, the Commission has through many years of administration devised three criteria to judge whether or not an employer-employee relationship exists for purposes of the personnel laws. These are whether a person is—

- (1) Engaged in the performance of a Federal function under authority of an act of Congress or an Executive order;
- (2) Performing duties subject to the supervision of a Federal officer or employee; and
- (3) Appointed in the civil service by a Federal officer or employee.

These criteria have, since the Fuchu opinion, been incorporated into the statutory definition of "employee" in the codification of the personnel laws. (5 U.S.C. 2105)

Explanation of the Criteria

The criteria are simply speaking the three most material considerations derived from the common-law rules of agency for determining the relationship of master and servant. As stated by the United States District Court (D.Md.) in *Maloof v. United States*, 242 F.Supp. 175 (1965), at 181, (quoting from *Keitz v. National Paving and Contracting Co.*, 214 Md. 479, 491, 134 A.2d 296, 301 (1937)):

"* * * [T]here are at least five *criteria* that may be considered in determining the question whether the relationship of master and servant exists. These are:

(1) the selection and engagement of the servant, (2) the payment of wages, (3) the power to discharge, (4) the power to control the servant's conduct, (5) and whether the work is a part of the regular business of the employer. *Standing alone, none of these indicia, excepting (4) seems controlling in the determination as to whether such relationship exists. The decisive test in determining whether the relation of master and servant exists is whether the employer has the right to control and direct the servant in the performance of his work and in the manner in which the work is to be done. It will be noted from the above, it is not the manner in which the alleged master actually exercised his authority to control and direct the action of the servant which controls, but it is his right to do so that is important.*" (Emphasis added.)

See also *Dovell v. Arundel Supply Corp.* 361 F.2d 543, 544 (D.C. Cir. 1966).

Three of these common-law criteria were expressly embodied in the test of Federal employment adopted by the Commission. Item (1) corresponds to "appointed by a Federal officer or employee;" item (4) to "subject to the supervision of a Federal officer" and item (5) to "performance of a Federal function." Item (3) was impliedly incorporated with the appointment factor; in Federal cases the power to remove is an incident to the power to appoint in the absence of a statutory provision to the contrary. *Burnap v. United States*, 252 U.S. 512, 515 (1920). Item (2) was not incorporated because the source of the funds from which individuals are paid does not affect their status as Federal employees. 37 Op. Atty. Gen. 121; 38 *id.* 136.

"To attempt to regulate, by law, the minute movements of every part of the complicated machinery of government, would evince a most unpardonable ignorance on

the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done, that can neither be anticipated nor defined and which are essential to the proper action of the government. Hence, of necessity, usages have been established in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits. And no change of such usage can have a retrospective effect, but must be limited to the future. Usage cannot alter the law, but it is evidence of the construction given to it; and must be considered binding on past transactions." (*United States v. Macdaniel*, 32 U.S. (7 Pet.) 1 at 4 (1833)).

This is particularly true in the administration of the personnel laws. The multi-faceted character of Federal employee status in its various modalities has of necessity fostered just such common-law concepts for administrative purposes. The purpose and intent of the particular statutes involved are significant factors affecting employee status. An individual, for example, may be a Federal employee for purposes of the Tort Claims Act but not for the Civil Service Retirement Act, e.g. *Anselmo v. Ailes*, 235 F.Supp. 203 (E.D. N.Y. 1964), or for purposes of the Federal Employees Compensation Act and thereby excluded from the Tort Claims Act. As stated in the Fuchu opinion, the Bureau of Employees Compensation of the Department of Labor developed the same criteria, independently, in administering the Federal Employees Compensation Act. See, e.g., *McNicholas v. United States*, 226 F.Supp. 965 (N.D. Ill. 1964).

An employee of an independent contractor may also be a loaned servant, e.g., specially employed, by virtue of a contract between his regular employer and the Government; *Denton v. Yazoo Co.*, 284 U.S. 305, 76 L.Ed. 310

(1932); *Standard Oil Co. v. Anderson*, 212 U.S. 215, 53 L.Ed. 480 (1909); *Robinson v. Baltimore and Ohio R.R. Co.* 237 U.S. 84, 59 L.Ed. 849 (1915); or a sub-servant. *Restatement, Second, Agency*, § 5; *State v. Baumann*, 286 N.W. 76 (Wis. 1939).

The same common-law concepts of master and servant which inhere in the Commission's criteria are used in the administration of other Federal laws such as the Social Security Act, Federal Insurance Contributions Act, and the Federal Unemployment Tax Act, among others; *Illinois Tri-Seal Products, Inc. v. United States*, 353 F.2d 216 (Ct. Cl. 1965), and cases there cited.

Application of the Criteria

The application of the criteria to the factual situation existing under the Fuchu contract quite clearly showed that the contract operated to circumvent the personnel laws. There are endless permutations of factual and contractual elements, which can result in unauthorized procurement of personnel by contract. The Fuchu situation was merely one rather obvious example.

The complexity of this problem and agency policies concerning "contracting-out" have led to the practice of judging contracts for services by the factual situation in the Fuchu case rather than by application of the criteria.

Therefore, in order to promote a better understanding of the criteria as applied by the Commission, we shall here seek to more fully explain their content. We believe such an exposition will add clarity to this opinion and also be helpful for guidance of agencies in the future.

Whether an employer-employee relationship is created under the criteria is not discernible by a mere summation of discrete elements. The criteria not only carry with them the traditional common-law and technical administrative definitions but also draw substance from the policy

and purposes of the complex of the laws bearing directly on government employment. Cf. *Harrison v. Gray Van Lines*, 331 U.S. 704, 67 S.Ct. 1463, 91 L.Ed. 1757 (1947); *Bartels v. Birmingham*, 332 U.S. 126, 67 S.Ct. 1547, 91 L.Ed. 1947 (1947).

The criteria must be realistically applied and the end-point determination reached on the basis of the over-all substance of the contract operations. For the purpose of insuring compliance with the personnel laws we do not believe it possible to refine the criteria or weight their elements in applications so as to indicate that mere changes in form or terminology will meet the substance of the Commission's objections. If, in substantial effect, the contract results in a form of personnel procurement not expressly authorized by law, it is proscribed by the personnel laws.

1. *Engaged in the performance of a Federal function under authority of an act of Congress or an Executive order.*

There has never been any dispute that support service contractor employees, working directly in support of agency missions, meet this criterion. This criterion provides essentially the same yardstick as the common-law test of whether or not the work performed is part of the regular business of the employer. (*Restatement Agency*, § 220-h)

Where the putative employer is the Government, however, there are peculiar elements which must be considered, namely, lawful authority and sovereignty. The limiting term "Federal function", as used here, was derived primarily in administering the Retirement Act to distinguish between Federal and state functions. See *Stapleton v. Macy*, 304 F.2d 954 (D.C. Cir. 1962). In judicial application the term has been used to denote that which the Federal Government may properly and constitutionally do. Cf. *Tennessee Electric Co. v. T.V.A.*, 21 F.Supp. 947 (E.D. Tenn. 1938).

Within the limitations of lawful authority and sovereignty, an activity conducted by a Federal agency pursuant to statutory authority and for which public funds have been appropriated is for the purpose of this criterion, a "Federal function" unless otherwise provided by law.

"* * * Congress undoubtedly intended that the provisions of the civil-service law, so far as these provided for the organization of a classified service, should be extended to all persons engaged in the legitimate civil work of the executive branch of the Government, whether such persons were or were not technically in the employ of the United States." (26 Op.Atty.Gen. 363 (1907))

Employees of Melpar and EMB in providing services in performance of the contracts under review are engaged in the performance of a Federal function which is being conducted under authority of law.

2. *Performing duties subject to the supervision of a Federal Officer or employee*

As noted, this criterion embodies the same considerations as the common-law test of control of a servant. The same considerations, if factually present, are relevant and material. As emphasized in the *Maloof* case, *supra*, which involved the determination of a master-servant relationship, between the employee of a contractor and a Government installation in Maryland, it is the right or power to control the individual in the performance of his work and the manner in which the work is done that is usually decisive. As stated in *Singer Mfg. Co. v. Rahm*, 132 U.S. 518, 523, 10 S. Ct. 175, 33 L.Ed. 440 (1889): "* * * the relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the results to be accomplished, or in other words, 'not only what shall be done, but how it shall be done.'"

For evidence of the existence or absence of Goddard's right to direct or control the work of contractor employees we look first at the terms of the contracts; then, at operations under the contracts; and finally, at what the courts have held in construing the relationship established by contracts similar to the contracts we are reviewing here. Article I of each contract describes the contractor as an independent contractor. "It is not, however, what the parties call a relationship which determines the legal nature of that relationship. Rather, it is what a party does or is authorized to do which determines the status." *Founders' Insurance Co. v. Rogers*, 281 F.2d 332, 337 (9th Cir. 1960). "Certainly, the nature of the relationship cannot be determined alone by the use of the term 'independant contractor' in the judgment agreement of the parties." *Hargis v. Wabash R.R. Co.*, 163 F.2d 608, 611 (7th Cir. 1947).

Each contract provides that all persons employed by the contractor shall be under the control of the contractor (Art. XI, c.2). Other noteworthy items are the provision for the appointment of a Project Supervisor who is stated to be contractor's supervisor for performance of all work assignments and the single point of contact between the contractor and the Government's Support Contract Coordinator (Art. XI-B)⁵ and the provision that the contractor shall be responsible for taking disciplinary action with respect to its employees (Art. XI, c. 3).

These provisions of the contracts standing alone seem to contradict a right of supervision or control by the Government. However, the contracts have to be read as a whole and the intent must be derived from the whole contract, not just from provisions of the contract that are looked at independently. "The spirit and purpose of an agreement, as well as its letter, must be considered in the interpreta-

⁵ See discussion *infra* regarding Key Personnel as Tantamount to Federal employee supervisors.

tion and application of the contract." *Cimorelli v. New York Cent. R. Co.* 148 F.2d 575, 578 (6th Cir. 1945); *Miller v. Robertson*, 266 U.S. 243 (1924).

First, it should be noted that these are nonspecific contracts. The contractor agrees to supply a certain number of people (expressed in man years) to provide scientific and engineering services at the Center. If a contractor shows up at the Center on the effective date of the contract with 130 technicians, he cannot tell them what to do. The contract does not tell him. The statements of work that are attached to the contract will not give him the information he needs either. The work statements as shown, *supra*, are expressed in general terms.

The contracts recognize this and provide (Art. V) that performance is to be subject to an ordering procedure under which task assignments will be issued to the contractor, designating the task to be performed, the schedule of performance and any other pertinent information, that is, reports, overtime, performance area, materials, or travel authorized.

Some of the sample task assignments obtained during our inspection are quite specific in their description of the work to be done; others are in rather general terms. The need to amplify task assignments seems to have been anticipated because the contracts provide (Art. X) for "technical direction". This is defined in Article X to mean *direction* to the contractor which fills in details, requires pursuit of certain lines of inquiry, or otherwise serves to accomplish the contractual statement of work. Technical direction is to be in writing and a "technical direction kit" is provided for use in issuing technical directions.

Taking the factual situation that is most favorable to the legality of these contracts, we will assume that when a technical direction is needed it is always in writing al-

though there seems to be considerable opinion among the people who are supposed to use it that the technical direction kit is cumbersome and awkward to use and as a result, in many cases the technical directions are oral. We will also assume, in spite of evidence to the contrary as far as operations are concerned, that technical directions are always given by a Federal official to a contractor supervisor and by him conveyed to the contractor technicians (task assignments are so conveyed).

On this basis, that the terms of the contract are strictly complied with, we ask this question: what discretion does a contractor supervisor have after he receives a task assignment or a technical direction from the Federal official? Does he have authority to decide whether or not to pass the task assignment or the technical direction on to the contractor technicians? Does he have authority to modify or change the task assignment or the technical direction in any way? The answers are clear: the contract supervisor has no such discretion under the terms of the contracts.

Who then is controlling or directing the work of the contractor technician: the contractor supervisor who delivers the message or the Federal official who sends the message? It cannot be the contractor supervisor; even though he may assign different parts of the task to different workers, set priorities, shift workers from one task to another, etc., he cannot change the substantive direction that comes from the Federal official.

Hence, on what is a contrary-to-fact assumption that everyone is strictly complying with the terms of the contracts, it is clear that direction or control of the contractor technicians by Federal officials is required if work is to be done under the contracts; and that this is recognized by the provisions of the contracts that specify how the contract is to operate, viz., the task assignment and technical direction provision.

Other provisions of the contract that may be cited as indications of the right to direct and control rather than as evidence are: Article XI-A—contractor employees work the same hours and days as Government personnel; Article XI-j—changeover provisions in which the contractor inferentially agrees to let his employees continue to work at Goddard for a Successor Contractor (information developed at Goddard indicates that 30 to 40 percent of present force are "holdovers"); and Article XIII—overtime for contractor employees must be approved by Goddard in advance.

In our review of operations under these contracts it became even more evident that contracts such as these cannot be performed unless the civil servants who are supported on the job have the right to direct the work of the contractor technicians. Consider some of the reasons given for failure to adhere strictly to the contract requirements that contractor employees receive directions only from contractor supervisors: there are a number of one and two-man "shops" to which it is not possible to assign contractor supervisors; contractor supervisors have many duties and one is not always available at the time the communication of the direction becomes necessary; some technicians' work involves unique specialities across a broad range of disciplines, which makes it impossible for an over-all contractor supervisor to have the knowledge required to give proper supervision to these employees; some of the technicians have worked at the same job up to five years, and have developed into specialists of such a high degree that no "general" contract supervisor could direct them in their work.

Moreover, to tell a draftsman to *draw* a plan is to tell him both what and how. The same applies to a welder, or a laboratory technician in the performance of routine tasks. We find no material difference in the degree of actual direction or control exercised over civil service technicians

and that exercised over contractor supplied technicians of the same class. No competent civil service draftsman is told "how" to draft, nor a typist how to type, nor a laborer how to shovel. Our review of performance evaluations of task assignments for purposes of award fee allocations ("proficiency of technical personnel" is a rating factor) also reveals that individual personal competence is often the thing being evaluated. This is understandable. Where such services are applied direct to the job a direction of what to do encompasses the full measure of ordinary supervision.

It seems apparent that the contractor supervisor is merely a *pro forma* supervisor. Where this appears, the Comptroller General has stated: "We must emphasize here that the supervision over the individuals performing the work required under a contract remains in the hands of Government personnel even if the contractor provides an additional employee to act as supervisor and relay instructions of Government personnel to other contractor-furnished personnel, and that the test of supervision by Government personnel must be applied to a contract as it operates even though its terms do not call for supervision." (44 Comp. Gen. 761, 763 (1965)). We agree.

But there are other factors relevant to whether the power of direction and control exists and is exercised by Federal officials over the contractor's personnel.

Furnishing of equipment and supplies

Article XII of each contract provides that "Government-furnished facilities, materials and equipment shall be used when the Government considers it advantageous to the Government." The only equipment and supplies that the Commission inspection found were supplied by the contractor were office equipment and office and administrative supplies for use by contractor supervisors and their clerical assistants. The indications are that the equipment

required to complete the task assignments that are given to contractor employees is of such a highly specialized nature that it would be impossible for the contractor to supply it.

[I]f the worker is using his employer's tools or instrumentalities, especially if they are of substantial value, it is normally understood that he will follow the directions of the owner in their use, and this indicates that the owner is a master. This fact is, however, only of evidential value." *Restatement, Second, Agency*, § 220. Comment on subsection (2)k.

We are told by NASA's General Counsel in commenting on our finding that the contractors supply no equipment, that EMR has performed seven percent of its effort off-site and Melpar about ten percent; that each utilizes equipment located off-site which is valued at about \$100,000 in the case of EMR and \$355,000 in the case of Melpar. The extent of use of such equipment off-site is not indicated. However, it does not appear to be required under the contract and is at best a minor circumstance perhaps engaged in for the contractor's convenience. We regard this factor as having little weight in our determination.

There is no representation that the contract calls for the use of any equipment or that Goddard must depend upon contractor equipment. Indeed, the contract itself refers to "highly complex equipment" owned by Goddard which will be supplied. As a matter of fact, the equipment is so highly specialized that it would be impossible for the contractor to supply it, and as NASA's General Counsel points out, it is more economical for the Government to furnish equipment than to indirectly stand the cost through contractor acquisition of the equipment. While we heartily agree with the wisdom of this policy, as a cost matter, we cannot ignore or discount its significance to the issue of who has the power to control the contractor-supplied personnel.

The temporary character of the services performed

"If the time of employment is short, the worker is less apt to subject himself to control as to details, and the job is more likely to be considered his job than the job of the one employing him." *Restatement, Second, Agency*, § 220. Comment on Subsection (2)j.

The contracts call for periods of performance for two years with an option to extend another year. They were let on the basis that a foreseeable need existed for three years.

The task assignments are open-ended and many will dovetail with previous and subsequent task assignments. One estimate was that 30 to 40% of the task assignments initiated at the beginning of the Melpar contract are continuing into the second year.

As to the individual task assignments, some of short duration, may be considered temporary or intermittent. But that is not the test by which one judges the temporary character of work. During the course of a day, a secretary may take dictation, type a letter, file documents, answer the phone, open the mail, etc. Each of these tasks is of short duration, but the need for the secretary's services is continuing. Tomorrow someone has to be there to perform all these "temporary tasks."

So it is at Goddard. The need for the support services supplied by contractor employees is constant and continuing. In the area covered by the EMB contract, for example, our inspection identified at least 45 jobs being done by contractor employees which involve long-term continuing functions. The workforce seems to be relatively stable. A change in contractors does not result in large turnovers in the contract personnel; many continue at Goddard under the new contractor. Article XI of the contracts the so-called "Change Over" clause was designed to foster retention of personnel on the job and it is effective. We have determined that some contractor-supplied

personnel have been doing the same type of work at Goddard for up to five years.

Furnishing of office or working space

Each contract (Art. VIII) provides for performance of the work at the Goddard Space Flight Center "or other sites designated by the Contracting Officer or his representative." With only a few exceptions, the services performed by contractor personnel are performed at Goddard Space Flight Center or in one of its outlying test facilities.

"If the work is done upon the premises of the employer . . . the inference is strong that such workmen are the servants of the owner . . ." *Restatement, Second, Agency*, § 220. Comment on Subsection (2)e.

The situation at Goddard is significantly different from that which exists when the premises themselves are turned over to the contractor. For example, in *Powell v. United States*, 339 U.S. 497 (1949), relied upon by NASA in support of its contract practices, the contractor operated a government-owned plant with government-owned material. The contractor provided all services which were subject to inspection by the government; and the government could require the dismissal of a contractor employee in the public interest. There, however, as distinguished from Goddard, the whole purpose shown by the contract was to create a private manufacturing, rather than a governmental, operation and the Secretary of War was specifically authorized by statutes to provide for the operation of such plants "through the agency of selected qualified commercial manufacturers." (54 Stat. 713, 50 U.S.C. App. § 1171(b), now repealed.) The contract itself was designed to insure the private operation of the plant with full managerial responsibility in the contractor. At Goddard that is not so as the government operates the plant and retains managerial responsibility so that in the final analysis all that the contractor does is to supply personnel to perform

the governmental tasks. Moreover, in *Powell*, the terms and objectives of the Fair Labor Standard Act was the *ratio decidendi*; "To hold otherwise would restrict the Act not only arbitrarily but also inconsistently with its broad purposes, *id.* page 515."

Whether the fee or the amount of the contract price is based upon the results to be accomplished rather than the time actually worked.

Basing the fee on the results to be accomplished tends to support a relationship of independent contractor; on the time actually worked, an employer-employee relationship. See *Restatement, Second, Agency* § 220, Comment on subsection (2)j.

An examination of the contract indicates that the amount of the contract price is generally based upon time actually worked. There is no fixed price involved; the gross amount stated is listed as an estimate of the cost. The contractor agrees to furnish a certain number of man years of service. Each task assignment is priced by the contractor in terms of required man hours by labor category and skill level and total dollar cost. Monthly financial management reports are submitted by the contractor on NASA Form 533 showing task assignments, hours of work and dollar cost. Also shown are overhead, base fee, direct materials and travel and other direct costs. The largest cost item on this report obviously is the cost for hours worked. In the main, the amount actually paid under the contract must be based on the time actually worked by the contractor technicians. The contractor is paid whether or not the particular task or sub-task has been completed, cancelled, delayed, or is still in progress.

Thus we have another factor that tends in the circumstances here presented to establish that contractor employees are under the control of Government officials.

Based on the above analysis, we conclude that EMB and Melpar employees perform duties under the direction and supervision of Federal officers and employees, and that in actuality Goddard officials have the power to, and do, direct and control the manner in which they perform their services.

3. *Appointed in the civil service by a Federal officer or employee*

This criterion, as here applied, equates with the common-law use of the power to select or hire as one of the indicia of a master-servant relationship: "He is deemed to be a master who has the superior choice, control, and direction of the servant" 56 C.J.S. 24, Master & Servant, § 1(b) (1948). Because of its peculiar aspects, a brief exposition of the concept of appointment as used in the Constitution and the personnel laws will be helpful.

Article II, section 2 of the Constitution, confers upon the President the power to nominate, and, with the advice and consent of the Senate, to appoint certain named officers and all other officers established by law whose appointments are not otherwise therein provided for; but it authorizes Congress to vest the appointment of inferior officers either in the President alone, in the courts of law, or in the heads of departments. *United States v. Germaine*, 99 U.S. (9 Otto) 508 (Oct. Term 1878); *United States v. Hartwell*, 73 U.S. (6 Wall.) 385 (Dec. Term 1867).

The distinction between "officer" and "employee" does not rest upon differences in the qualifications necessary to fill the positions or in the character of the service to be performed. Whether the incumbent is an officer or employee is determined by the manner in which Congress has specifically provided for the creation of the several positions, their duties and appointment thereto. *United States v. Hartwell*, *supra*; *United States v. Germaine*, *supra*; *United States v. Perkins*, 116 U.S. 483, 484 (1886); *United States*

v. Mouat, 124 U.S. 303, 307 (1888); *United States v. Smith*, 124 U.S. 525, 532 (1888); *Burnap v. United States*, 252 U.S. 512 (1920); 21 Op. Atty. Gen. 355, 356; 15 Op. Atty. Gen. 3; 29 Op. Atty. Gen. 116.

“The head of a department has no constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legislation he must be governed, not only in making appointments but in all that is incident thereto.” (*Myers v. United States*, 272 U.S. 52 at 160 (1926), citing *United States v. Perkins*, *supra*.)

It has been the practice of Congress since the establishment of the Government to vest in the heads of departments not only the power of appointment of inferior officers but also authority to employ or appoint clerks and other employees necessary to carry out the functions of the departments. When independent agencies were later created, Congress vested in the heads thereof the power to employ or appoint employees. The term “appoint” is used as the equivalent of “employ”, and is sufficiently broad to encompass filling positions which require technical skill, learnings, and professional training. *Burnap v. United States*, *supra*. 29 Op. Atty. Gen. 116, 123; 21 Op. Atty. Gen. 363; 20 Op. Atty. Gen. 728.

It was not until 1946 that Congress specifically authorized the head of an agency to delegate his power of appointment to subordinate officials in other than the field service (sec. 12, Act of August 2, 1946, (60 Stat. 809, 5 U.S.C. 302)). Prior to this time it had been consistently held by the legal and accounting officers of the Government that the appointing power vested in the head of a department could not be delegated to a subordinate (other than an Assistant Secretary), in the absence of specific statutory authority therefor. See 20 Comp. Gen. 27 and decisions and opinions cited therein.

By far the greater number of persons rendering service for the Government are employees as distinguished from officers in the constitutional sense. Where a statute merely authorizes the head of an agency to appoint persons as may be necessary for the purposes of the statute, without specifically prescribing duties to be performed, the agency is authorized to create the necessary positions and the incumbents of these positions when appointed or employed by an authorized Federal officer or employee, are Federal employees. *Burnap v. United States, supra*; 5 U.S.C. 2105(a).

The term "employee" is hence used in a peculiar sense and "signifies all subordinate officials of the National Government receiving their appointments at the hands of officials who are not specifically recognized by the Constitution as capable of being vested by Congress with the appointing power." (The Constitution of the United States of America, Analysis and Interpretation, Sen. Doc. No. 39, 88th Cong. 1st Sess. p. 504 (1964)).

We are concerned here only with the appointment of employees. In these cases the act of appointment is the choice, designation, or selection of the individual to occupy a Federal position. This is so because the essence of the power of appointment is the right of choice; *Myers v. United States, supra*.

The courts have also adhered to this view in applying the criminal laws (18 U.S.C. 215); designed to protect the integrity of the merit system's appointive processes. It is "... the element of selectivity which makes the choice a designation or an 'appointment'." *United States v. Jacobs*, 116 F. Supp. 928 (N.D. Ill. 1953); see also *United States v. Hood*, 343 U.S. 148 (1952); *United States v. Walls*, 225 F. 2d 905 (7th Cir. 1955); *cert. denied* 350 U.S. 935 (1956). The Comptroller General has also embraced this usage. A contract purporting to establish an independent contractor-contractee relationship between an individual and a Gov-

ernment agency was held to create instead an employer-employee relationship whereby the individual was "employed" in an "appointive" position within the meaning of the Retirement Act.

"... our decisions consistently have held that persons employed under a contract of employment are within statutory prohibitions against, or restrictions on, the re-employment of annuitants (section 204 of the act of June 30, 1932, 47 Stat. 404, 5 U.S.C. 715a (1952 ed.); section 2(b) of the act of May 29, 1930, as amended by section 2 of the act of January 24, 1942, 56 Stat. 13, 5 U.S.C. 715; section 2(b) of the act of February 28, 1948, 62 Stat. 49). 12 Comp. Gen. 300; 14 *id.* 253; 18 *id.* 573 (amplified, 18 *id.* 624); 22 *id.* 300; B-125559, December 27, 1955, May 16, July 30, and August 28, 1957. In view of our long-standing interpretation of the term 'appointed' and its variants as used in the statutes just cited, we would not be warranted in holding that Congress used the word 'appointive' in section 13(b) in a more restrictive sense than similar words heretofore were used." (39 Comp. Gen. 681, at 683-684)

Thus, in application of the personnel laws, this appointment criterion is met if the power to choose or select individuals to occupy Federal positions is vested in or exercised by a Federal officer or employee.

The Commission has adopted the rule that in the absence of fraud or bad faith, an irregularity (failure to meet statutory or regulatory requirements) in seeking to effectuate an appointment does not necessarily make the appointment void. See e.g. 39 Op. Atty. Gen. 517; 30 Op. Atty. Gen. 169; 21 Op. Atty. Gen. 289; 20 Op. Atty. Gen. 293). When the Commission does not consider the appointment void so as to absolutely require removal of the employee from the position the appointment is voidable, permitting the Commission, as a general rule, to ratify, rescind, or require other correction of the irregular action taken by the agency.

Thus, where the position is an established one and there is an entrance on duty, and the duties are performed under official supervision, the selection or appointment may be established by the acquiescence of Federal officers who accept the services. Even where there is a defect in the authority to appoint, this may be so. For example, in the *Burnap* case, *supra*, the Supreme Court found that "the appointment of Burnap by the Secretary of War, instead of by the Chief of Engineers, was without authority in law" but that "the defect in Burnap's original appointment was cured by the acquiescence of the Chief of Engineers throughout the five years." *Id.*, p. 518.

Generally in order to have a valid appointment, there must be a position to which an employee is or can be appointed. Under the personnel laws, positions exist whether or not occupied by an employee.

A Federal position is a specific civilian office or employment consisting of the duties and responsibilities currently assigned by competent authority and requiring full-time or part-time employment of one person.

In order to illuminate the effect of the contract practices under review as they relate to the creation of positions, it is pertinent to refer to Commission issuances in applying the personnel laws for this purpose. In Chapter 312 of the Federal Personnel Manual, it is explained that the head of each agency is vested with the authority and has the responsibility for organizing the agency within requirements of its organic acts and the statutes relating to the administration of the Federal Government. He has the obligation to structure the agency in a manner which will assure that assigned missions are legally and properly accomplished. The structuring process involves the assignment of missions and functions to major organizational units. Eventual subdivision of missions and functions into systems, processes, and tasks brings the organization process to the basic unit—the position.

The primary objective in assignment of duties and responsibilities to individual positions is to provide the basis for orderly, efficient, and economical accomplishment of the work of the organization. The most important steps in position planning are analysis of the work to be accomplished and decision on productive methods to be used. These decisions condition the procedures and processes to be employed; the machinery, tools, and other production aids to be utilized, and the specific tasks and operations to be performed. The volume and nature of production to be accomplished may affect the division of duties and work specialization. It is necessary to consider also the requirements for supervision, specialized technical support, quantity and quality control, and review and evaluation.

A Federal position is thus created when the responsible management official makes a decision that certain work is to be performed by an individual in order that the organizational unit may discharge its functions. An official record of this decision is provided by a position or job description. The creation of the position is formalized by classifying it in accordance with the former Classification Act of 1949 (now Chapter 51 and Subchapter III, of Chapter 53, title 5, United States Code), or other salary or wage-fixing authority.

This concept of a position (now codified at 5 U.S.C. 5102(a)) also has been recognized by the Comptroller General in noting that certain work amounted to a "position" within the meaning of the Classification Act.⁶

The Commission's determinations concerning whether a position or an incumbent of a position is in the competitive service or within the coverage or exemptions of the classification laws are final.

⁶ See, e.g., 4 Comp. Gen. 947, 948; 6 *id.* 364; *id.* 374; 9 *id.* 67, 68; 11 *id.* 252.

Turning now to the contract operations under review, it is material to consider whether or not Federal positions have been created in connection with these contracts.

The workforce supplied to Goddard by the Melpar and EMR contracts is relatively stable. Melpar supplies about 40 men per month to the Experimental Division and six to the Laboratory for Theoretical Studies. The number of Melpar employees assigned to the Projects Directorate averages between 12 and 14. The EMR contract manager stated that his company supplied an average of 65 to 70 employees per day to the Spacecraft Technology Division. The contracts estimate an average monthly rate of effort at 108 man months (Melpar) and 95 man months (EMR). The Commission found that some of the EMR employees have been doing the same type of work for up to five years. While some of the EMR employees may be shifted from one branch or section to another, the same duties have continued over a long period of time, and in many cases have been performed by the same employee.

In the course of our inspection, Goddard officials repeatedly pointed out that contract support services are an integral part of Goddard operations. This is also shown by the statements of work made a part of the Melpar and EMR contracts which provide that "the contractor may be required to perform other scientific and engineering support services required to accomplish the NASA mission assigned to the subject Division."

If support services contracting is an integral part of Goddard operations required to accomplish the NASA mission assigned to its various organizational divisions, it necessarily follows that contractor personnel are performing the regular work of the agency. Since the numbers and required skills of personnel required are identifiable in terms of man years, it seems clear that what Goddard has done in this situation is to create Federal positions.

There is next for consideration the question of who selects or chooses the individual who performs the services under the contract.

The Fuchu contract specifically provided that "selection of personnel by the contractor shall be subject to approval of the contracting officer". It also provided that the "contracting officer may, if he finds it to be in the best interest of the Government, direct the contractor to remove, and the contractor shall remove, any employee from an assignment to perform services under the contract." In the circumstances there presented, it was clear that in acting under this authority the contracting officer was, in effect, exercising an appointing authority, even though it was not so labeled.

The contracts under consideration do not contain similar provisions. Each does, however, contain a list of key personnel by name and position. These personnel cannot be replaced or reassigned without approval by the contracting officer. These provisions are designed to, and do, give the Government the power to approve key personnel and control their assignment. NASA emphasizes that this clause reflects good contract administration in that it seeks to ensure that NASA will get the degree of managerial competence from the contractor that it requires and for which it pays.

The desire of a Government agency to retain the power to select or control the selection of contractor personnel used to perform services for it is understandable. Contract terms, however, which give the agency that power, convey in the context of our analysis, a power equivalent to a power of appointment. The exercise of such power inheres in the mere execution of the key personnel provisions in the circumstances under review. This, of course, may not be so where similar clauses are used in other types of contracts which are administered differently than those here involved.

What occurs insofar as key personnel are concerned is roughly analogous to the certification by the Civil Service Commission of eligibles for appointment to equivalent supervisory positions in NASA. The agency examines the qualifications of the individuals certified and appoints those acceptable to it within the authorized range of selection.

Assumedly, NASA would reject a key person which the contractor proposed to use if NASA considered that person incompetent. This is precisely the contingency that the clause is designed to protect against. The fact that no such rejections are of record is immaterial.

Those key personnel designated as supervisors, realistically speaking, perform the same functions and stand in the same relationship with respect to higher management officials of Goddard as civil service supervisors. They serve as a channel by which the work is directed on-site and provide follow-up and feed-back to higher Goddard management.

In legal effect, insofar as constituting a power of appointment, there is no material difference between the power retained in the key personnel clause and the power retained to approve technicians in the Fuchu situation.

As to the individual technicians supplied under the Melpar and EMR contracts, our investigation showed a few instances where the power of selection, through approval of a replacement, or the power of removal, through the performance evaluation process, was exercised. These exceptions, however, are at best only indications of the retention of the power to appoint or control the selection of the employees supplied. Another such indicator is the retention at Goddard of a substantial portion of the contractors' workforce.

Our investigation which was not exhaustive on the point shows that at least 40 percent of the Melpar and many of the EMR employees working at Goddard were holdovers from previous contractors. When this high incidence of

retention is viewed in the light of the contract "change over" clauses, it is patent that the clauses operate to retain at Goddard a substantial number of "personnel experienced in the work provided herein" without regard to any meaningful exercise of choice by the contractor involved.

Three things seem clear from our review of these contract operations: (1) Goddard officials retain the power to select key personnel; (2) Federal positions have been created and are occupied by contractor-supplied personnel, and (3) the retention of a substantial number of employees in continuing positions at Goddard under different contractors negates any real selection of these individuals by the contractor.

Viewed in the light most favorable to NASA, we are at the very least confronted with a situation which has resulted in a delegation to a private corporation of the right to select necessary personnel to perform the functions of the agency. Under 5 U.S.C. 302, this authority may be delegated only to "subordinate officials" of the agency. Cf. 22 Comp. Gen. 700.

NASA has no legal authority to contract for personal services without regard to the personnel laws.

Congress has enacted various laws to govern the acquisition, maintenance, and severance of the employer-employee relationship between a Federal agency and an individual (see title 5, United States Code). These laws apply unless a clear exception can be found in some other statute or other legal authority. For example, see 25 Op. Atty. Gen. 341; 26 *id.* 363, 502; and 27 *id.* 95 for the necessity of clear and affirmative language indicative of the intention of Congress to create an exception from the laws relating to appointment.

We have found no authority under which NASA is authorized to contract for personal services without regard to the Code of Personnel Laws. The statutes cited by NASA do

not confer a specific exception or other authority. A brief discussion of each will suffice to show this.

The McNamara-O'Hara Service Contract Act of 1965 (79 Stat. 1034, 41 U.S.C. 351-357). This statute requires that certain provisions be contained in every contract entered into by the United States, the principal purpose of which is to furnish services through the use of service employees. This statute does not authorize any agency to enter into this type of contract; the agency must first have the authority by virtue of some other statute before the terms of the Service Contract Act become applicable.

Sections 102(c) and 203(b)(5) of the *National Aeronautics & Space Act of 1958* (42 U.S.C. 2451(c) and 2473(b)(5)). These sections direct NASA to conduct its activities so as to obtain the most effective utilization of the scientific and engineering resources of the United States and to enter into and perform contracts or other transactions that may be necessary in the conduct of its work. We do not dispute the fact that NASA has authority to contract. This language, however, is not the clear and affirmative language that is required to create an exception from the personnel laws which would authorize the contracts under review. This is obvious when they are read in *pari materia*. Section 2473(b) of 42 U.S.C., also specifically provides (§ 2473(b)(2)) that NASA's employees be appointed in accordance with the civil service laws and their compensation fixed in accordance with the Classification Act of 1949. The same subsection authorizes the appointment of not more than 425 of the scientific, engineering, and administrative personnel of the Administration "without regard to such laws". Paragraph 9 of the same subsection (§ 2473(b)(9)) authorizes NASA to obtain services "as authorized by section 55a of title 5" (which authorizes the procurement of temporary or intermittent services of experts or consultants by contract without regard to the civil service and classification laws). Hence, two conclusions are obvious. One is that when Congress wanted NASA to have exceptions from the

civil service and classification laws, it provided for the exceptions in clear and unambiguous language; the other is that the provision cited by NASA as authority is not such a clear and unambiguous exception.

Section 1(d) of the *NASA Authorization Act, 1966* (P.L. 89-53), provides in part as follows:

"(2) . . . maintenance and operation of facilities, and support services contracts may be entered into under the 'Administrative operations' appropriation for periods not in excess of twelve months beginning at any time during the fiscal year."

The *Independent Offices Appropriation Act of 1966* (P.L. 89-128) provides in pertinent part:

"That contracts may be entered into under this appropriation for maintenance and operation of facilities, and for other services, to be provided during the next fiscal year."

The language of both of these provisions is clear that the intention was to authorize the continuation of contracts beyond the close of one fiscal year into another fiscal year. Even though support services contracts are specifically mentioned, the language is clearly not an authorization to enter into personal service contracts of the type under review. That authority, if it exists, must be found elsewhere.

Another statute mentioned by NASA, 10 U.S.C. 2304(a), authorizes NASA and the military departments to negotiate contracts without advertising if "(4) the purchase or contract is for personal or professional services." This is an exception from the advertising requirements. Such provisions have never been considered an authorization to contract for personal services without regard to the personnel laws. Indeed, the opposite has been long established. See, e.g. 30 Comp.Gen. 490.

Bureau of the Budget Circular No. A-76 expresses the Government's general policy of relying on the private enterprise system to supply its needs. The same circular, however, states that it is not to be used as authority to enter into contracts if such authority does not otherwise exist. We interpret the reference to this circular by NASA's General Counsel to suggest only policy support for its contracting practices. Clearly this circular is not and could not constitute authority to contract in derogation of statutes.

NASA has, therefore, cited no authority to us and we have been unable to find any which would authorize procurement of personnel by contracts such as those under review.

II. CONCLUSIONS

A. The Contracts Under Review Are Unauthorized, When Judged by the Criteria

Our insistence upon scrupulous observance of the personnel laws is, in a sense, premised upon the same fundamental principle edified in *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961):

"... The moral principle upon which the statute [18 U.S.C. 434] is based has its foundation in the Biblical admonition that no man may serve two masters, Matt. 6:24, a maxim which is especially pertinent if one of the masters happens to be economic self-interest"
(At page 549.)

The same notion inheres in the decisions of the Comptroller General regarding those "personal services" which cannot be contracted out. Although there is considerable diversity in the factual characteristics of the "personal service" determinations by the Comptroller General, the consistency in orientation of these decisions which span more than a century and involve the question in varying legal and historical

aspects, is truly remarkable. The *stare decisis* of these decisions, if there be one, is that they require strice adherence to the requirements for procuring Federal employees prescribed by the Congress in the personnel laws.

The thrust of the Comptroller General's interest is, of course, fiscal accountability, whereas, that of the Civil Service Commission is the over-all integrity of the personnel systems as more fully explained in Appendix A. Both, however, are true to the principle inherent in our constitutional form of government that the essential functions of Government and the employment of individuals required to perform these functions are a responsibility which cannot be delegated to private interests.

The clear impact of our findings under the three criteria when viewed in total perspective is that support technicians supplied by Melpar and EMR have been placed in a relationship with the Government which is tantamount to an employer-employee relationship. Realistically viewed, the contracts result in the procurement of personnel in violation of the requirements and policies of the personnel laws as administered by the Commission. Such practices have an adverse effect upon the civil service system as more fully explained in Appendix A and detract from sound manpower utilization practices and objectives within the Executive Branch.⁷

B. Contracts Under Review Do Not Conform to Executive Branch Policy as Prescribed in Bureau of Budget Circular No. A-76.

There are a wide range of activities of an industrial and commercial nature which agencies lawfully undertake and which are subject to being contracted out in conformity

⁷ The potential liability upon the retirement fund for service claims by contractor employees, many of whom have some Federal service, is not definitely known but is estimated to be substantial.

with existing policy directive, Bureau of Budget Circular No. A-76, Revised August 30, 1967. The circular applies to "commercial and industrial products and services used by executive agencies," but emphasizes that it is not an authority to contract, will not be "used to justify departure from any law or regulation, including regulations of the Civil Service Commission or other appropriate authority, nor will it be used for the purpose of avoiding established salary or personnel limitations." (Sec. 4(a))

This policy directive recognizes a limit on the character of services that can be contracted out in expressly providing that it:

"Does not alter existing requirements that executive agencies will perform for themselves those basic functions of management which they must perform in order to retain essential control over the conduct of their programs. These functions include selection and direction of Government employees, assignment of organizational responsibilities, planning of programs, establishment of performance goal and priorities, and evaluation of performance."

Whether contracts for services depart from civil service laws or the regulations of the Civil Service Commission is a matter for determination by the Civil Service Commission. Having concluded that the contracts in question are in violation of these laws, it follows that they also transgress the policy prescribed for the Executive Branch.

C. The Civil Service System Can Supply the Necessary Personnel

Our investigation showed that in June 1967, there were approximately 2500 contractor employees serving at Goddard which included those supplied by the contracts under review. Specific information in terms of the number of people working in any one position or in any one group of

positions was not obtainable. It was, however, determined that the majority of contractor employees provide trades, labor, and technical support services and that relatively few are physical scientists and engineers.

Trades and labor positions filled by contractor employees included cement masons, laborers, welders, carpenters, mechanics, warehousemen, bricklayers, etc.

Technical support positions filled by contractor employees included electronic technicians, electronic assemblers, and laboratory technicians.

The number of physical scientists and engineers serving on contract at Goddard is relatively small. The vast majority of such individuals are civil servants.

Programmers and statistician services are provided by both civil servants and contractor employees. There is examination coverage for these positions although applicant shortages do exist.

Our inspection establishes that generally there are in fact civil service employees at Goddard who do the same type of work that contract employees do.

Our Bureau of Recruiting and Examining, after a review of this matter, reports:

"Generally, we either have or could readily provide examination coverage for the kinds of positions we have been able to identify as occupied by contractor employees.

"Generally, the labor market situation for skilled tradesmen, and technical and professional personnel is such that all agencies in the Washington area are required to take positive recruitment action in order to meet their staffing needs. The same situation would apply to Goddard in the event that positions now occupied by contractor employees are converted to Civil Service positions.

"With aggressive recruiting by the Goddard operating and personnel officials, we see no reason why the Civil Service examining system cannot supply Goddard with the kind of people now working there under contract."

D. Corrective action required

We are advised by NASA that it plans to rectify all violations and that if they cannot be remedied consistent with the intended independent contractor status of Melpar and EMR, all necessary action will be undertaken to have the involved functions performed by civil service employees. We are assured by NASA officials that personnel ceilings are not the causes of the contracting practices under review, and are informed by the Bureau of the Budget that additional ceiling can be provided to NASA where conversion is necessary. In the absence of specific legislative authority to continue the contracts under review, we are of the view that orderly termination or conversion is required.

NASA advises that it is undertaking a "broad study of its support service contracts to evaluate the basis for decisions to contract out, to evaluate the administration of the contract [sic] to assure they conform with sound management practice and applicable statute, and to assure that the costs of such are carefully considered as an important factor in determining the best means for providing the services required."

The Commission has been invited to participate in this study and stands ready to afford whatever assistance NASA desires. It appears, however, that contracting practices identical or similar to those under review are widespread, and are having an increasingly significant impact upon personnel practices and policies in the Executive branch. The Commission deems it essential for the guidance of all agencies therefore to now set forth those elements

which we believe result in unauthorized contracts or contract personnel practices which offend the requirements and purposes of the personnel laws.

In so doing, we must emphasize that our responsibilities do not allow nice distinctions as to technical legality of contracts balancing and weighing the myriad of factors, conditions and circumstances in each particular case. We must, of necessity, lay down general guides and ask their observance by the agencies.

In the absence of clear legislation expressly authorizing the procurement of personnel to perform the regular functions of agencies without regard to the personnel laws we must insist on scrupulous adherence to those laws and the policies they embody. Accordingly, contracts which, when realistically viewed, contain all the following elements, each to any substantial degree, either in the terms of the contract, or in its performance, constitute the procurement of personal services proscribed by the personnel laws.

—Performance on-site

—Principal tools and equipment furnished by the Government

—Services are applied directly to integral effort of agencies or an organizational subpart in furtherance of assigned function or mission

—Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel

—The need for the type of service provided can reasonably be expected to last beyond one year

—The inherent nature of the service, or the manner in which it is provided reasonably requires directly or indirectly, Government direction or supervision of contractor employees in order:

—To adequately protect the Government's interest or

—To retain control of the function involved, or

—To retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.

Applying these standards, the contracts under review and *all like them* are proscribed unless an agency possesses a specific exception from the personnel laws to procure personal services by contract.

THE PERSONNEL LAWS AS AN EXPRESSION OF NATIONAL POLICY

"All officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it.

"It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to the supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives." *United States v. Lee*, 106 U.S. 196, 220, 1 S.Ct. 240, 27 L.Ed. 171 (1882)

"No department of the government has any other powers than those thus delegated to it by the people," *Hepburn v. Griswold*, 75 U.S. 8 (Wall.) 603 (1869).

In a government of delegated powers, where public office is a public trust, the authority to discharge official responsibilities reposes only in those persons duly appointed and vested by law with an office or employment. It is axiomatic that official authority can be delegated only to those properly appointed to exercise it. The Federal civilian service of the executive branch is in this aspect the personification of government by law; it is through the exercise of the powers of public office by Federal employees that the process of self-government is executed. The personnel systems prescribed by Congressional and

Presidential authority constitute the exclusive methods of staffing this civilian service; of investing private persons with public authority.

The power to create Federal positions outside the civil service and personnel laws cannot therefore be implied; it exists only if expressly provided by the Congress. For a properly appointed official to create a relationship that by law must be regarded as an employer-employee relationship, in derogation of the laws and regulations controlling Federal employment is *ultra vires*. To the extent the exercise of official authority and responsibility is in actual practice delegated through such acts to private persons or corporations, there is an unlawful delegation or an abdication. To the extent such acts contravene the specific requirements of the civil service laws they are illegal.

Consistent with the genius of our government, the personnel and related statutes embody certain essential principles which must be observed if our concept of democracy is to be preserved.

Without express statutory authority a government agency cannot accept donated services from an individual, even if freely given.¹ A contrary rule of law would provide the seeds of tyranny and chicanery. Conversely, a Federal employee cannot accept any supplementation of salary from private interests.² To permit this would be to compromise integrity. A Federal employee cannot perform any service other than that for which his salary is appropriated by the Congress. To allow otherwise would permit unauthorized expenditures of public funds and confound accountability.³

Consistent with the notion that ours is a government of the people and by the people, the opportunity to gain public employment must be open to all—without regard to race, religion, color, national origin or political affiliation.

Consistent with the notion of a government for the people, only those whose character, fitness, and loyalty⁴ are con-

sidered worthy of a public trust are deemed suitable, and only those willing to accept, under oath,⁵ the responsibilities of public service are appointed. Limitations imposed by law upon the individual's right to strike,⁶ political activity,⁷ and conflicting interests⁸ are strict but essential appurtenances to public office.

The classification law requires that governmental duties and responsibilities be identified and grouped into discrete positions, that positions be classified and that compensation be allotted on the principle of equal pay for equal work. The entitlement to a certain level of pay, to employee benefits, the evaluation of employee performance, accountability for public funds, government liability to third parties, employer-employee rights and obligations, and the ultimate legality of official acts are all affected by compliance or lack of compliance with the civil service and personnel laws.⁹

In addition, certain national policies of inherent social value are prescribed in the personnel laws. That honorable service in the armed forces of the United States deserves recognition through veterans preference is one such policy.¹⁰ Nondiscrimination on the basis of race, creed, color, sex, national origin,¹¹ or politics¹² is another. Official recognition and dealing with employee organizations conditioned upon a no-strike pledge is another.¹³ And economic security through retirement annuities for service or disability¹⁴ is yet another.

It is these principles and policies that are disserved when personnel are unlawfully procured by means of contract to perform duties under circumstances that must under law be regarded as creating an employer-employee relationship with the government. This is particularly acute where the contractor supplies personnel who work on government premises, use government equipment, and are interspersed with and directed by civil service employees. There is, in such situations, an "interface" between the

contractor's personnel system and all facets of the civil service system which is abrasive to employee morale, erosive of civil service laws and policies and destructive of efficiency and sound management.

For example, the Government and private employer alike know the evils of nepotism, personal favoritism, and patronage, and the perils of incompetence. The civil service system has met this problem with the competitive examining process. This process has stood the test of time and has been effective for a myriad of occupations in all types of labor markets. A civil service examination rating is accepted as evidence of competence by private and public employers alike.

Contractors may also examine their job applicants but the quality of such examinations vary widely. Some of the contracts we have examined call for personal "competent to perform the work," or for "qualified" personnel. Standing alone, such standards are not especially meaningful. Where qualifications standards are prescribed in contracts we find they are invariably civil service standards, sometimes slightly modified for the occasion. In our review of operations under contracts over the past two years, we often find in occupation after occupation, where both civil service and contractor employees are involved, that the assignments given civil service employees are the more responsible and difficult and require the greater skill.

In the matter of pay, such as incremental increases for superior performance,¹⁵ time in grade,¹⁶ and promotion practices, the use of contractor personnel sets up countervailing forces at the work site that derogate civil service objectives. Federal pay rates in the General Schedule are predicated on position classification principles. They are interrelated to provide orderly progression from one grade to another and designed to provide in-grade increases for performance at a satisfactory level of competence for periods of one year or longer.¹⁷ Although comparable

pay with the private sector is the policy,¹⁸ Congressional action in prescribing General Schedule rates has resulted in compression at the higher levels, so that pay in the lower grades is comparable, and pay in the higher grades lower, than for private enterprise. Cash incentives are awarded only for special individual or group achievements.¹⁹ A minimum of one year must be served in grade before a regular promotion can be made to a higher grade.²⁰ Wage board employees' rates are set at levels equal to average prevailing rates for the same level of skills in private industry in the area involved.²¹ A wage board employee must be hired and compensated at established rates.

These compensation requirements of the public service do not necessarily bind the private contractor's pay, bonus, or promotion policies. For essentially the same work, performed under the same conditions, for the same government, a contractor and civil service employee of comparable skill and proficiency may be compensated and promoted at substantially disparate rates. Both, however, are paid by the Government, one directly, the other indirectly.

Overtime work and pay levels are also prescribed by law for the civil servant,²² but subject only to individual contractor policies for the contractor employee. These on-the-job condition lead to justifiable as well as fancied reasons for employee dissatisfaction. The disadvantage from the civil servant's perspective is often apparent. Where this is so, morale is depressed, motivation is dulled, performance is affected, and in the end the ability of the civil service to function efficiently and effectively is diminished.

Another adverse ramification of these disparities is that the Government is in reality generating its own competition for scarce skills. The esoterics of space science and technology, for example, are the results of a national commitment to explore space. There is but one ultimate consumer and one ultimate beneficiary of this effort—the public.

For the Government to bid for shortage category personnel against personal service contractors is highly obstructive to the civil service system and contrary to sound manpower utilization practices. It is apparent in many cases that the contractor employees who possess these scarce skills are employed, or become subcontractors to the contractor, solely for the purpose of having their services sold to the Government. In these situations, the contractor who provides solely personal services is actually substituted by a contracting officer for the civil service system. The net effect, as has been established by General Accounting Office audits, may well be higher cost to the Government for services which should have been, and could have been, provided by regularly appointed Federal employees.

These comparisons, founded upon our investigations of contracting practices at several Government agencies, can be shown with the same adverse impact upon the civil service system across the broad spectrum of personnel administration. There are similar disparities between the civil service and contractor employees in the entitlement to, and use of, leave for vacation,²³ sickness,²⁴ military service,²⁵ jury duty,²⁶ voting,²⁷ blood donation, and family deaths; in compensation for on-the-job injuries²⁸; in retirement benefits for disability and old age²⁹; in group life³⁰ and health insurance benefits³¹; in travel and relocation allowances³²; in training and development opportunities³³; and in the rights and entitlements to inventions, patents, and the use of new technology^{33a}, among others.

The extent of these disparities is magnified by the obligations imposed by law and regulation upon the Federal employee. Unlike his counterpart employed by a contractor, the civil servant must proclaim his loyalty to our constitutional form of government,³⁴ under oath. His conduct is circumscribed by strict rules of ethics, prescribed by Executive order³⁵ and Congressional resolution³⁶ and special provisions of the civil and criminal laws relating to brib-

ery,³⁷ graft,³⁸ conflicts of interest,³⁹ partisan political activity and fund raising,⁴⁰ misuse or destruction of government property and records,⁴¹ habitual use of intoxicants,⁴² agency for a foreign principal,⁴³ and the right to strike,⁴⁴ among others.

We must also consider the impact upon employee loyalty. An employee's loyalty to his employer, be it Government or private enterprise, is essential for efficiency of operations and for protection of the employee's interests. One surmises from our investigations that some contractor employees are sorely perplexed as to where their loyalties should lie—with the original contractor who hired them, the successor contractor that presently pays them, the future contractor that may hire or fire them, or the civil service supervisor in the unit in which they serve.

Civil service training, career development and merit promotion programs are incentives to motivate the employee to improve his skills, to enlarge his capabilities, and to adopt a public service career. These programs are mutually beneficial; the employee gains new capabilities and the Government benefits by the retention of a skilled and experienced career civil servant. The training of contractor employees on the other hand is often at Government request and either directly or indirectly at government expense. The government is not assured, however, of any continuing benefit from this investment.

Closely related to employee loyalty and morals is the matter of performance evaluation. Performance evaluation at best is a difficult, sensitive undertaking; however, where civil service and contractor employees are intermixed on the job, it becomes exceedingly difficult, if not impossible. This is particularly true where a contractor employee may be replaced by a civil service employee, or vice versa, on a particular task assignment prior to its completion.

As to on-the-job performance of the contractor employee, Government managers, have advised in the past that they could get an unsatisfactory contractor employee off the job in 24 hours. However, we are cited one example where separation was delayed three months and accomplished through the quarterly evaluation for determination of the incentive award fee. Presumably at this point, the contractor was informed that the "end product" e.g., the employee's services, were unsatisfactory.

Lastly, the furtherance of national policies through the civil service system may be compromised by unauthorized contracts for personal services. For example in the Veterans Preference Act, now codified in title 5, United States Code, Congress has provided an absolute preference to veterans for positions of guards, elevator operators and custodians in the competitive service as long as preference eligibles are available.⁴⁵ And what of the policy objectives served by the statutory restrictions on partisan political activity by Federal employees and the prohibitions against the right to strike? By what authority does an administrative officer, perhaps even a minor one, decide in the course of contracting for personal services that veterans shall not be accorded preference for custodial jobs; or that what is tantamount to Federal employee status can be conferred without the concurrent obligations to refrain from exercising the right to strike, or to avoid pernicious political activity?

There is clear recognition of the national policy embodied in the personnel laws in BOB Directive A-76, which prescribes contracting policy for the Executive branch. This policy directive explicitly negates any intent to alter existing authorities, or to justify departure from any law or regulation of the Civil Service Commission, or to avoid established salary or personnel limitations. Contracts for personal services which in fact and in law do depart from civil service laws and regulations, are accordingly in violation of this policy.

That an agency or management official may consider the requirements of the civil service laws and policies difficult or tedious in application is no justification for turning the hiring and management of personnel over to a contractor.

The foregoing findings and conclusions have been distilled from Commission experience and constitute the basis of the Commission's concern in the matter of contract practices. There is no intent or purpose to reflect adversely upon the performance or capability of any contractor or upon the unparalleled contribution of private enterprise to Government programs.

It is, however, considered necessary for the full discharge of the Civil Service Commission's duties and responsibilities as the central staff agency for civilian personnel, to clarify and amplify the legal, policy, and factual basis upon which contracts for personal services are proscribed under the national policy expressed in the civil service laws.

FOOTNOTES

¹ R.S. 3679 (1875), 31 U.S.C. 665(b).

² 18 U.S.C. 209.

³ Art. I, sec. 9, cl. 7, U.S. Constitution, R.S. 3678 (1875), 31 U.S.C. 82(c), 628. Cf. *Converse v. United States*, 62 U.S. 462, 470 (1858).

⁴ 5 U.S.C. 3333, 7311.

⁵ 5 U.S.C. 3331, 7311.

⁶ 5 U.S.C. 3333, 7311.

⁷ 5 U.S.C. 7321-7327.

⁸ 18 U.S.C. 201-219.

⁹ 5 U.S.C. 5101-5115, 5 U.S.C. 5331, 5 U.S.C. 6301-6324, 5 U.S.C. 8701-8716, 5 U.S.C. 8901-8913, 5 U.S.C. 4301-4308, 28 U.S.C. 2674, see e.g., 26 Op. Atty.Gen. 363 (1907), 32 Comp. Gen. 18.

¹⁰ 5 U.S.C. 3309-3319.

¹¹ 5 U.S.C. 7151. The policy of nondiscrimination applies to government contractors also.

¹² 5 U.S.C. 3303.

¹³ Executive Order 10988, 3 CFR (1959-1963 Comp.).

- 14 5 U.S.C. 8331-8348.
- 15 5 U.S.C. 5336.
- 16 5 U.S.C. (1958 ed.) 43 note; 65 Stat. 757, § 1310 (1951).
- 17 5 U.S.C. 5335.
- 18 5 U.S.C. 5301-5302.
- 19 5 U.S.C. 4501-4506.
- 20 5 U.S.C. (1958 ed.) 43 note; 65 Stat. 757, § 1310 (1951).
- 21 5 U.S.C. 5341-5344.
- 22 5 U.S.C. 5541-5544.
- 23 5 U.S.C. 6303.
- 24 5 U.S.C. 6307.
- 25 5 U.S.C. 6323.
- 26 5 U.S.C. 6322, 5515, 5537.
- 27 FPM Supp. 990-2, p. 630-51.
- 28 5 U.S.C. 8101-8150.
- 29 5 U.S.C. 8301-8348.
- 30 5 U.S.C. 8701-8716.
- 31 5 U.S.C. 8901-8913.
- 32 5 U.S.C. 5701-5742; 80 Stat. 323.
- 33 5 U.S.C. 4101-4118.
- 33(a) Executive Order 10096, 15 Fed. Reg. 389 (1950); Presidential Memorandum and Statement of Government Patent Policy, issued October 10, 1963, 28 Fed. Reg. 10943 (1963).
- 34 5 U.S.C. 3331, 3333.
- 35 Executive Order 11222; 3 CFR (1965).
- 36 H. Con. Res. 175, 85th Cong. 72 Stat. Pt. 2-B-12.
- 37 18 U.S.C. 201.
- 38 18 U.S.C. 203.
- 39 18 U.S.C. 205, 207, 208.
- 40 5 U.S.C. 7321-7327.
- 41 18 U.S.C. 2071.
- 42 5 U.S.C. 7352.
- 43 18 U.S.C. 219.
- 44 5 U.S.C. 7311.
- 45 5 U.S.C. 3310.

Exhibit E to the Complaint

Received December 12, 1967

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
WASHINGTON, D. C. 20546

Dec. 12, 1967

In Reply to: BPM
Mr. John F. Griner, National President
American Federation of Government Employees
400 First Street, N. W.
Washington, D. C. 20001

Dear Mr. Griner:

This refers to your telegram of December 4, 1967 to Mr. James E. Webb, Administrator of NASA, regarding possibility of delaying reduction-in-force at NASA George C. Marshall Space Flight Center, Huntsville, Alabama.

As we have indicated in our several discussions with you and Mr. Scanlan of your office, the recent action by Congress reduced NASA's appropriations requiring a number of measures to reduce costs. Included in these Congressional actions was a reduction in NASA's Administrative Operations Appropriation which necessitates a reduction in Civil Service personnel. However, as you know we will be effecting a good part of our personnel reductions through attrition. It is painful but necessary in some instances to use reduction-in-force procedures. In order to effect the economies required we must begin these as early as possible. Unfortunately, therefore, we have no alternative and must issue the advance notices of the reduction-in-force at this time. However, we would be pleased to meet with you in order to discuss further details of these actions.

We sincerely regret the adverse consequences which some of our employees may be required to face. In order to minimize these consequences, NASA has established an out-

placement program to assist affected employees in obtaining other Federal or non-Federal positions.

We are sorry that we are unable to furnish you a more favorable reply.

Sincerely yours,

GROVE WEBSTER

Grove Webster

Director of Personnel

4255 5 86

BRIEF ON BEHALF OF APPELLANTS

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,006

LODGE 1858, AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, ET AL., *Appellants*

v.

JAMES E. WEBB, Administrator, NATIONAL AERONAUTICS
AND SPACE ADMINISTRATION, ET AL., *Appellees*

and

NATIONAL COUNCIL OF TECHNICAL SERVICE INDUSTRIES,
Intervenor-Appellee

On Appeal From a Judgment of the United States District
Court for the District of Columbia

United States Court of Appeals

for the District of Columbia Circuit

FILED SEP 10 1968

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CLERK

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,006

LODGE 1858, AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, ET AL., *Appellants*

v.

JAMES E. WEBB, Administrator, NATIONAL AERONAUTICS
AND SPACE ADMINISTRATION, ET AL., *Appellees*

and

NATIONAL COUNCIL OF TECHNICAL SERVICE INDUSTRIES,
Intervenor-Appellee

On Appeal From a Judgment of the United States District
Court for the District of Columbia

BRIEF ON BEHALF OF APPELLANTS

QUESTIONS PRESENTED

1. Did the District Court err when it ruled "there is no such thing as a collective bargaining agreement between a union and a Government department that is binding"; and that the courts in the federal system are powerless to enforce collective bargaining contracts between federal agencies and federal employee unions?

2. Is there any real difference in purpose, scope, substance, form or effect between the collective bargaining agreement in this case and those in private industry which are regularly enforced by federal courts as a matter of public policy and pursuant to a long line of decisions of the Supreme Court so directing?

3. Is the complaint in this case, based on a written collective bargaining contract between the National Aeronautics and Space Administration and appellant Lodge 1858, and upon NASA's violation of federal statutes and breach of the President's and its own regulations, barred by this Court's decisions in *Manhattan-Bronx Postal Union v. Grounouski* and *National Association of Internal Revenue Employees v. Dillon*?

4. Did the District Court err by dismissing the complaint in this action until the individual appellants exhaust their administrative remedies before the Civil Service Commission in a case wherein, after the complaint was filed, NASA and the Commission conceded that 598 of the 764 proposed reductions-in-force were tainted by NASA's improper service contract operations and should be cancelled as a matter of law, and wherein the Commission has continuously taken the position it has no jurisdiction administratively to determine the legal issues raised by the complaint?

5. Did the District Court err by granting the intervention of National Council of Technical Service Industries?

THE FACTS

This appeal stems from a judgment of the District Court (Judge Holtzoff), dated April 23, 1968. The District Court, after granting a Preliminary Injunction herein pursuant to which 598 of the alleged 764 illegal federal civil service employee reduction-in-force actions here involved were voluntarily and permanently cancelled by the appellees, suddenly reversed the logic and reasoning which sup-

— This case has not previously —
— been before this Court.

ported the Court's initial ruling, summarily vacated the Preliminary Injunction previously granted, and dismissed the complaint as to the remaining 166 personnel actions which were alleged to be tainted with the same illegality as those voluntarily cancelled by the appellees.

As set forth hereinbelow, appellants verily believe that the District Court's said judgment is erroneous and wrong. It does violence to an existing collective bargaining agreement between appellant Lodge 1858 of the American Federation of Government Employees and the National Aeronautics and Space Administration. And, it has deprived approximately 166 federal employees of fair and equal treatment under the federal civil service laws. Indeed, the said judgment actually permitted the two defendant federal agencies, already subject to the aforementioned Preliminary Injunction, to dispose of all the justiciable issues in this case and to gain summary dismissal of the complaint against them through the simple, but wholly unjust device, of *unilaterally, arbitrarily and hastily making an agreement between themselves* as to which of the 764 federal employees involved in the unlawful RIF action would be retained in their positions and which would nevertheless still be separated or demoted—a device, by the way, which enabled the National Aeronautics and Space Administration capriciously to discriminate against the individual plaintiffs who had the courage to challenge their employer's unlawful procedures in the first place.

This appeal, therefore, presents questions of great importance to appellants in this case and to federal civil service employees generally. Appellants thus pray that this Court, after patiently, fairly and carefully reviewing the record herein, will reverse the judgment of the District Court and remand this action for further proceedings and judgment on the merits.

The basic facts out of which this case arose are as follows: In 1958, Congress created and established the

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National Aeronautics and Space Administration (NASA) and directed NASA to plan, direct and conduct aeronautical and space activities for the Federal Government (J.A. 7).¹ Congress authorized NASA "to appoint and fix the compensation of such officers and employees as may be necessary to carry out such functions"; but Congress specifically provided in the NASA statute that, with very limited exceptions not here relevant, "Such officers and employees shall be appointed in accordance with the civil service laws and their compensation fixed in accordance with the Classification Act of 1949 . . ." (J.A. 7, 42 U.S.C. § 2473 (b) (2)).

Congress in the 1958 NASA statute also expressly directed the Administrator of NASA to file annual reports with the Congress setting forth precisely how NASA was performing and adhering to the said personnel requirements and restrictions of the Act (J.A. 7).

Thereafter, in 1960, NASA established and commenced to operate, as one of its functions under the 1958 Act, the George C. Marshall Space Flight Center at Huntsville, Alabama (J.A. 7, 9). In compliance with the aforementioned provisions of the 1958 NASA statute, NASA proceeded to fill most of the positions of employment in its offices, laboratories, warehouses and facilities at the said Center with civil service employees of the United States, appointed in accordance with the Civil Service laws which govern and control the appointment, compensation and employment rights, benefits and obligations of federal employees (J.A. 8). In July, 1960, for example, 4,600 civil service employees were so employed at the Center (J.A. 59).

Prior to 1960, the facilities at the NASA Center in Huntsville had been operated by the Army's Ballistic

¹ See 42 U.S.C. 2472, 2473.

Missile Agency (J.A. 8, 59). Accordingly, when NASA assumed control of the Center in 1960 and the work that was then underway, it retained a relatively small complement of non-civil service (private contractor) employees who had been working for the Army (J.A. 8). In July, 1960, these non-civil service contractor employees numbered approximately 1,000 (J.A. 59).

Thereafter, and approximately two or three years later, NASA began very substantially to deviate from and ignore those Congressional directives and policies which required it to fill jobs at the new Marshall Space Center with federal civil service employees (J.A. 8). By alleging that it required the services of additional large numbers of "*temporary employees*" to meet unusual, urgent, temporary "peak workloads", NASA adopted the policy of soliciting and making "personnel support contracts" with private business corporations. Some of the contractors thus solicited by NASA were large, nationally prominent companies; others were relatively small companies, locally and suddenly organized or expanded in the Huntsville area itself solely for the purpose of entering into personnel contracts with the Government (J.A. 8, 9). Under the contracts made with NASA, those corporations received large fees and other very substantial and unusual profits simply to recruit and provide for employment at the Center clerical workers, blue collar tradesmen (mechanics, sheet metal workers, carpenters, plumbers, welders and the like), technicians, professional employees, guards, chauffeurs, truck drivers, etc—i.e. employees NASA could have obtained for employment at the Center just as readily and far less expensively directly through the regular procedures of the federal Civil Service laws and in accordance with the Congressional directives contained in the 1958 NASA statute (J.A. 8, 9).

In fact, during the period from 1960 through 1964, the number of non-civil service contractor employees obtained

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In fact, during the period from 1960 through 1964, the number of *non-civil service* contractor employees obtained

by NASA under *private personnel "support contracts"* at the Center grew from approximately 1,000 to 6,421, i.e. an increase of almost 600 per cent, while the number of civil service employees at the Center was increased by less than 60 per cent over the 4,600 originally employed in 1960 (B. 60).

Under the terms of these so-called "*support contracts*" and in actual practice, none of the employees recruited and assigned to work at the Marshall Center by the various private personnel contractors were required to be appointed or employed in accordance with the Civil Service laws of the United States and none were so employed (J.A. 9). Nevertheless, these contractor-employees were assigned by NASA to work in offices, laboratories, warehouses, vehicles and work shops at the Marshall Center side-by-side and in direct job competition with Federal civil service employees of the United States (J.A. 9). In fact, they were, in almost all cases, assigned to perform work which was identical or substantially identical to that simultaneously performed by federal civil service employees (J.A. 9). In almost all instances, NASA, at its own expense, provided these contractor-employees with all of the tools and equipment they required to perform their duties at the Center right down to such basic items as desks, paper and pencils (J.A. 9). And, of course, all such contractor-employees worked hand-in-hand with federal civil service employees at the Center to perform work exclusively for NASA and to accomplish the tasks and functions which had been assigned to NASA under the 1958 statute by the Congress (J.A. 9). Indeed, in all instances, the work of the said federal civil service employees and private contractor-employees was actually subject to the same common direction, control and supervision of U.S. Government supervisors at the Center; and in each job occupation, all worked the same shifts and were subject to identical working conditions (J.A. 9).

NASA's contract policies in violation of the 1958 NASA statute and of the civil service laws of the United States reached such proportions by the end of 1966 that—

(1) NASA had separate contracts with no less than 12 personnel contractors, the main function of each being to furnish *non civil service employees* to perform *regular day-to-day work at the Center in direct competition and side-by-side with federal civil service employees*. All of these contracts were "*cost plus award fee contracts*", and they involved a total cost to the Center of approximately \$70,000,000 per year (J.A. 11, 12);

(2) All guard positions at the Center, originally filled exclusively by civil service employees, were entirely filled by contractor employees, in spite of the fact that Congress had specifically provided (at 5 U.S.C. 3310) that competition for "guard positions" shall always be "restricted to veterans preference eligibles" (J.A. 12);

(3) All truck driver and chauffeur positions, originally filled by civil service employees, were completely filled by contractor employees (J.A. 12);

(4) Contractor employees had been integrated into every office, laboratory and warehouse at the Center with the possible exception of the Headquarters offices. In the *Management Services Office*, for example, 189 civil service employees were employed side-by-side with 671 employees of the RCA Service Company to perform NASA's "*management services*" at the Center (J.A. 12). In the *Technical Services Office*, 534 civil service employees worked side-by-side with 476 employees furnished by Management Services, Inc. of Tennessee. In the *Manufacturing Engineering Laboratory*, 715 civil service employees (including professionals, technicians, clerical employees and blue collar tradesmen) worked with 238 employees furnished by Hayes International Corporation (including professionals, technicians, clerical employees and blue collar tradesmen).

In the *Test Laboratory*, 630 civil service employees worked with 476 employees furnished by Vitro Corporation; and in the *Propulsion and Vehicle Engineering Laboratory*, 740 civil service employees worked alongside 772 employees furnished by Brown Engineering Company of Huntsville, Alabama—again all performing common work assigned, directed and supervised by civil service employees of NASA (J.A. 13).

Because of the vast degree to which NASA had allowed these illegal personnel contracting practices to expand (at both the Marshall Center in Huntsville and its Goddard Space Center near Washington, D. C.), its personnel operations became the subject of intensive investigations by both the General Accounting Office and the Civil Service Commission of the United States (J.A. 13; J.A. 248-295). At the conclusion of these investigations in 1964, both the Commission and the General Accounting Office ruled that NASA's personnel contract practices at Goddard (which were substantially identical to those in effect at Marshall) violated both the Civil Service laws and the Classification Act of 1949, as amended (J.A. 13).

Thereafter, in a Report to Congress dated October 19, 1964 (copy of which is included in the Joint Appendix at pages 248-260), the Commission and the General Accounting Office reported that NASA's private personnel contracts of the type discussed above were in serious violation of the Civil Service laws "because a relationship tantamount to that of employer-employee was created between the Government and contractor employees" (J.A. 13). More specifically, the said Report, addressed by the Comptroller General to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, stated (J.A. 248, 249):

"... A contractual arrangement under which the Government can control contract work by exercising substantially the same supervision and control over

contractor-furnished employees that it exercises over regularly appointed civil service employees violates the statutes setting forth the conditions and requirements relating to Federal employment.

"Our review showed also that the contract for the service had been awarded without any determination of the relative cost of performing the services with contractor-furnished employees and with civil service employees. We estimate that the cost of the contractor-furnished services was . . . 40 percent in excess of the cost that would have been incurred if the services had been performed by civil service employees who are subject to the Classification Act of 1949, as amended."

The last mentioned 1964 Report concluded with the following recommendation regarding the specific NASA private personnel contracts then under consideration (J.A. 259):

"In light of the uneconomical aspects of contract NAS 5-2078, we recommend that NASA (1) compare the cost of the services being obtained under follow-on contract NAS 5-3760 with the cost of the services if performed by civil service employees and (2) if excess costs are being incurred, make arrangements for the performance of the work by civil service employees."

Upon receipt of that Report and the recommendation therein contained in 1964, NASA assured both the Civil Service Commission and the Comptroller General that all necessary corrective actions would be taken at its various installations and that henceforth NASA would fully comply with the federal civil service laws and the provisions of the 1958 NASA statute in the operation of its Space Flight Centers (J.A. 14; 255). In fact, NASA thereupon promulgated regulations of its own (NPC 401), entitled "*NASA Policy and Procedures for Use of Contracts for Nonpersonal Services*", which stated that "generally, services necessary in connection with governmental activities are for performance by regular employees of the Government

and subject to Government supervision" (J.A. 265). Thus, NASA cautioned all of its officials that private contracts for personnel services should be the exception rather than the rule, and it set forth the following criteria which allegedly should be met before any contracts for personnel services were to be made or renewed (J.A. 265):

"1. Contracts for services may not be used to evade personnel ceiling limitations.

2. If services are of a type that historically has been performed by Government employees, there must be compelling reasons for contracting.

3. Performance of support services by Government employees should be examined and a determination made as to whether continued performance by Government employees is more economical and efficient than by contract.

4. Consideration should be given as to whether suitably qualified Government personnel are readily available or obtainable at the installation involved for timely and efficient performance of the services required."

Contrary to its assurances to CSC and GAO and contrary to the sense and spirit of its own regulations, however, NASA went right ahead and continued to administer and expand its intermingled or integrated civil service-contractor personnel system of operations at the Marshall Space Center without material change (J.A. 14). Any changes in contract language inserted as a result of the aforementioned critical reports were mere changes in form, not in substance. In 1965, for example, the average number of contractor personnel working at NASA's Centers was about 16,800 (J.A. 267). In 1966, NASA proposed to increase the average number of such contractor personnel to 22,400 and to about 24,400 in 1967 (J.A. 267)—*those increases to be accomplished without any material increase in the number of civil service personnel employed by the agency* (J.A. 267). Indeed, in 1966, NASA still employed

6,000 private contractor employees at the Marshall Center alone (J.A. 60).

Accordingly, numerous complaints and objections to this private contract personnel system continued to be filed with both the Civil Service Commission and the General Accounting Office (J.A. 14). As a result, in 1966, the Commission commenced a new overall investigation of NASA's personnel policies and procedures, and the General Accounting Office did likewise (J.A. 14).

Thereafter, on June 9, 1967, the Comptroller General submitted another formal Report to the Congress (J.A. 260-295). This Report stated, in effect, that the actions NASA allegedly took after the 1964 Report to the Congress to eliminate the unlawful private contracting practices referred to in that first Report were simply evasive and intended to circumvent the laws rather than to comply with same. In this regard, the 1967 Report stated (J.A. 287):

"On the basis of our review, we believe the contractual documents were drawn so as to avoid creating an employer-employee relationship between Government supervisors and contractor-furnished personnel, thereby providing compliance with applicable civil service laws. In the *administration* of the contracts, however, there were indications that certain . . . actions were in essence creating an employer-employee relationship and, therefore, possible violations of the applicable laws."

And, at J.A. 291-294, the Comptroller General's 1967 Report concluded:

"We believe that the results of our review clearly indicate that savings of some significance can be achieved at MSFC and GSFC if the services covered by our review are carried out by civil service employees rather than contractor personnel . . .

"Because the action to fully correct the situation discussed in this report would require a significant

change in NASA's policy relating to the use of support service contracts and because of the potential effect that a significant change may have on NASA's civil service personnel requirements, the Congress may wish to consider the policy aspects of this matter in further detail with NASA officials. The Congress may wish also to explore with NASA the impact that cost considerations should have in determining whether to use contractor or civil service personnel in those cases where either contractor or civil service personnel could carry out the operation equally well."²

A few months later, in October, 1967, the General Counsel to the Civil Service Commission, after conducting a thorough study of NASA's personnel contracts at the request of the Comptroller General, rendered a detailed opinion entitled "*Legality of Selected Contracts—National Aeronautics and Space Administration*". That opinion is printed in the Joint Appendix, at J.A. 295-362. At the outset of said opinion, the Commission's General Counsel referred to the 1964 investigations of NASA's personnel contracts, and stated (J.A. 295):

"... both the Commission and the General Accounting Office considered that the services performed by these contractor employees were personal services: that personal services necessary to perform a Government function are for performance by regular employees of the Government appointed and compensated in accordance with the civil service and classification

² In the Comptroller General's covering letter of June 9, 1967 to the Congress, he stated (J.A. 260, 261):

"Our review of the relative costs of obtaining the necessary services through the use of support contracts and through the use of civil service employees showed that estimated annual savings of as much as \$5.3 million could be achieved with respect to the (9) contracts we reviewed at Goddard and Marshall if these services were to be performed by civil service employees . . .

"The indicated savings are attributable, for the most part, to the elimination of many contractor supervisory and administrative personnel, which would result from a conversion to civil service staffing and the elimination of the fees paid to contractors." (Emphasis supplied)

laws; and that in the absence of specific authority a Federal agency is not authorized to contract for personal services without regard to the personnel laws applicable to Federal employees generally." (Italics added).

And, at J.A. 300, 301:

"... it has been the Civil Service Commission's experience that the procurement and use of personnel by unauthorized contracting practices have an adverse impact upon the Civil Service system and tends to frustrate the purposes and national policies expressed by the personnel laws. The extensive use of contractor-supplied personnel for the performance of Government missions poses issues of critical importance to our system of government, to any meaningful concept of "public service" and to the continuing vitality of the civil service system . . .

"The contracts under review present a clear example of the 'interface' between what is presumed to be private enterprise on the one hand and government operations on the other. This dichotomy appears upon analysis to be more *theoretical* than *real* in many segments of the aerospace field. The exercise of government authority, the management and control of government programs, the limits of official responsibility and of government liability in contract and tort, may all be critically affected by the actual employment status of contractor-supplied personnel."

The Counsel's opinion then went on to discuss in detail the results of the CSC's 1966-67 study of NASA's private personnel contract policies and procedures, and near the end of said opinion the following legal conclusions were reached (J.A. 344-350):

1. "*NASA has no legal authority to contract for personal services without regard to the personnel laws. Congress has enacted various laws to govern the acquisition, maintenance and severance of the employer-employee relationships between a Federal agency and an individual (see Title 5, United States Code). These*

laws apply unless a clear exception can be found in some other statute or other legal authority . . .

"We have found no authority under which NASA is authorized to contract for personal services without regard to the Code of Personnel Laws . . ."

2. *"The Contracts Under Review Are Unauthorized . . . Realistically viewed, the contracts result in the procurement of personnel in violation of the requirements and policies of the personnel laws as administered by the Commission. Such practices have an adverse effect upon the civil service system . . . and detract from sound manpower utilization practices and objectives within the Executive Branch."*

3. *"The contracts under review do not conform to Executive Branch policy as prescribed in Bureau of Budget Circular A-76 . . ."*

4. *"The Civil Service System can supply the necessary personnel—Generally, we either have or could readily provide examination coverage for the kinds of positions . . . occupied by contractor employees."*

Finally, at the very end of the General Counsel's opinion, six (6) specific "*standards*" were set forth so that NASA would readily recognize which of its personnel contracts were clearly "proscribed by the Federal personnel laws" (J.A. 351-353). In this regard, the opinion stated (J.A. 351, 352):

"It appears . . . that contracting practices identical or similar to those under review are *widespread*, and are having an increasingly significant impact upon personnel practices and policies in the Executive branch. The Commission deems it essential . . . to now set forth those elements which we believe result in unauthorized contracts or contract personnel practices which offend the requirements and purposes of the personnel laws.

"In so doing, we must emphasize that our responsibilities *do not allow nice distinctions as to technical*

legality of contracts . . . We must, of necessity, lay down general guides and ask their observance by the agencies.

"In the absence of clear legislation expressly authorizing the procurement of personnel to perform the regular functions of agencies without regard to the personnel laws, we must insist on scrupulous adherence to those laws and the policies they embody. Accordingly, contracts which, when realistically viewed, contain all the following elements, each to any substantial degree, either in the terms of the contract, or in its performance, constitute the procurement of personal services proscribed by the personnel laws.

—Performance on-site.

—Principal tools and equipment furnished by the Government.

—Services are applied directly to integral effort of agencies . . . in furtherance of assigned function or mission.

—Comparable services, meeting comparable needs are performed in the same or similar agencies using civil service personnel.

—The need for the type of service provided can reasonably be expected to last beyond one year.

—The inherent nature of the service, or the manner in which it is provided reasonably requires directly or indirectly, Government direction or supervision of contractor employees . . ."

At J.A. 353, the General Counsel's opinion thereupon stated that when NASA's personnel contracts were judged by the last mentioned "*standards*"—

"the contracts under review and *all like them* are proscribed . . ."

When NASA was apprised of these latest rulings and recommendations of the Comptroller General and the Gen-

eral Counsel to the Civil Service Commission, it advised the Commission in the latter part of 1967 (J.A. 16, 17)—

"... we plan to rectify all these violations. If they cannot be remedied, NASA will take all necessary action to have these functions performed by Civil Service employees."

Shortly thereafter, however, and before NASA took any effective actions whatsoever to rectify any of the existing private personnel contract violations at the Marshall Space Flight Center *and before any steps were taken to terminate the illegal employment of thousands of "contractor employees" still employed throughout the offices and facilities at the Center*, NASA announced, on November 29, 1967, that allegedly because Congress had reduced NASA's fiscal 1968 budget, NASA would have to reduce its existing force of *civil service employees* at the Center by a "net" of approximately 764 persons (J.A. 17, 62).³ That reduction was to be made while NASA admittedly intended to continue to retain no less than approximately 5,000 private contractor employees in their same or similar positions; *and in most cases these private contractor employees were to succeed to or replace civil service employees removed from their positions during the said reduction-in-force* (J.A. 19, 20-22; 60).⁴

³ While the Reduction-in-Force involved a net of 764 persons in the final analysis, NASA admitted before Judge Holtzoff that actually "the total number of individual (civil service) employees . . . affected by the reduction-in-force procedure is . . . 1,120" (J.A. 62). 569 were to be discharged; 300 reduced in grade and pay; 260 were to be reassigned to distant posts of duty (J.A. 62). Numerous civil service employees, faced with reductions in pay or distant reassignments, were simply compelled to resign (J.A. 62).

⁴ NASA also contended before Judge Holtzoff that its "contractor support" at Huntsville had "*declined*" through employee and job attrition from 6,044 employees in Fiscal 1965 to 5,633 in Fiscal 1967 (J.A. 60). NASA also was constrained to admit, however, that *even before* the proposed reduction-in-force, its federal civil service force had likewise declined as a result of "job attrition" (J.A. 60). In other words, up to and including the proposed Reduction-In-Force, NASA had not cancelled any private support contract at Marshall or discharged any contractor employees because of the "illegalities" described above.

The announced reduction was to include many veteran civil service employees with absolute statutory veterans preference retention rights to their respective positions (J.A. 17, 18). It was also to be so broad that it would include in its spectrum professional civil service employees, technicians, clerks, secretaries, and all types of "blue collar" employees, including mechanics, machinists, carpenters, plumbers, sheet metal workers and the like (J.A. 17, 18). Simultaneously, of course, NASA proposed to retain in the very offices, warehouses, laboratories and plants from which these civil service employees were to be removed private contractor employees who performed and *would continue to perform* the same work from which the civil service employees were to be separated (J.A. 18-22).

At the time NASA announced, in November, 1967, that the said reduction of civil service employees would proceed, NASA was a party to a written Collective Bargaining Agreement made on January 28, 1966 with appellant Lodge 1858 of the American Federation of Government Employees (J.A. 22). That Agreement is printed in the Joint Appendix at pages 219-247. Under that contract, NASA recognized Lodge 1858 as "the exclusive bargaining agent . . . for all (civil service) employees of the Center except management officials . . . , supervisory employees" and the like (J.A. 220, 221). That bargaining unit, in January, 1966, included "some 2,530 white collar and 1,300 wage board (civil service) employees" (J.A. 219).

Under the provisions of Article II of the said collective bargaining contract, NASA expressly recognized and agreed that Lodge 1858 had the duty and responsibility "to represent, fairly and equitably, the interests of all employees within the unit with respect to grievances, personnel policies, practices and procedures, or other matters affecting their general working conditions" (J.A. 220).

And, at Article IV of the said contract, NASA specifically agreed as follows (J.A. 222).

"Section 1. It is agreed and understood that matters appropriate for consultation between the parties are policies and procedures related to working conditions which are within the discretion of the Employer, including such matters as . . . reduction-in-force practices . . ." (Italics supplied).

Indeed, NASA and Lodge 1858 went further in the said collective bargaining contract regarding the vitally important subject of "*reductions-in-force*", and at Article XVI, they reached the following additional agreements (J.A. 239):

"Reduction-In-Force

Section 1. The Employer agrees to notify the Union in advance of reduction-in-force actions at which time the Union may make its views and recommendations known concerning the implementation of such reduction-in-force actions. In the event of a reduction-in-force, the Employer further agrees to fully explain to the Union the competitive levels to be affected and the justification therefor.

Section 2. *In the event of a reduction in force, existing vacancies will be utilized to the maximum extent feasible to place employees in continuing positions who otherwise would be separated from the service. All reductions-in-force will be carried out in strict compliance with applicable laws and regulations.*" (Italics supplied)

And, with regard to the closely related subjects of *Civil Service System* "*Merit Placement*" and "*Contracting Out*", the collective bargaining agreement between NASA and Lodge 1858 provided (J.A. 241; 245):

"Article XVIII—Merit Placement . . .

Section 1. The Employer agrees to fill vacant positions on the basis of merit and fitness *and to maintain*

a career service which affords maximum opportunity for continuity of employment and optimum utilization of employee skills.

Section 2. *The Employer agrees to conform to appropriate Civil Service Commission . . . regulations and directives in effecting such non-competitive actions as promotions, reassignments, changes to lower grade, transfers . . .*"

"Article XXVII—Contracting

Section 1. The Employer will give the Union as much notice as possible in advance of contracting actions which may displace career employees. *Employer further agrees to minimize displacement by taking every possible prudent action to retain career employees.*" (Italics supplied)

In spite of these clear provisions in the aforementioned collective bargaining agreement, NASA announced the aforementioned Reduction-in-Force and proceeded to put it into effect without (a) any consultation whatsoever with Lodge 1858 (J.A. 22);⁵ without giving the Union any advance notification of the proposed reduction-in-force actions and without seeking its views or recommendations (J.A. 23);⁶ and without seeking to explain the "competitive levels" utilized or the justification for the utilization of such levels under the circumstances here presented, where retention preference civil service employees were to be dismissed while non-preference contractor employees, working side-by-side with them to perform the same work for NASA were to be retained.⁷

More importantly, NASA breached and violated the said collective bargaining contract by failing promptly to com-

⁵ The failure to consult constituted a violation of Article IV, Section 1 of the said contract.

⁶ The failure to give notice and to seek the Union's recommendations violated Article XVI, Section 1 of the contract.

⁷ This failure to explain the "competitive levels and the justification therefor" violated Article XVI, Section 2 of the contract.

ply, as it said it would, with the directives contained in the aforementioned opinion of the General Counsel to the Civil Service Commission and with the letter and spirit of its own regulations and by failing, in the face of an apparent need for a reduction-in-force, to vacate, as NASA had represented it would, positions held at the Center by contractor employees with no statutory retention preference rights whatsoever and pursuant to contracts found to be unlawful by the Civil Service Commission (J.A. 22-24).⁸ Thus, contrary to Article XVI of the collective bargaining contract, available "*vacancies*" were not utilized by NASA "*to the maximum extent feasible to place employees in continuing positions who otherwise would be separated from the service*"; and having completely ignored the sense, purpose and substance of the reduction-in-force retention preference laws applicable to civil service employees, the RIF was not carried out "*in strict compliance with applicable laws and regulations*", as required by Section 2 of Article XVI of the contract. *Ergo*, contrary to the provisions of Articles XVIII and XXVII of the collective bargaining agreement, NASA did absolutely nothing in this instance—

(a) "to maintain a career service which affords maximum opportunity for continuity of employment";

OR

(b) "to fill positions on the basis of the (civil service) merit system"; or

(c) "to minimize displacement by taking every possible prudent action to retain career employees" in preference to contractor employees.

The result of these contract and statutory violations, of course, was that on or about December 6, 1967, the indi-

⁸ These failures violated Article XVI, Article XVIII and Article XXVII of the contract between NASA and Lodge 1858.

vidual appellants (Brouillette, Campbell, Ellett, Easter, Gunter and Boden) and approximately 760 other civil service employees in the bargaining unit represented by Lodge 1858 at the Marshall Center received notices that they would be discharged (or, in some cases, demoted or transferred) effective January 13, 1968 (J.A. 18).

In the case of appellant Brouillette, he had completed 21 years of faithful, satisfactory federal service when he received his RIF notice in December, 1967 (J.A. 19). At that time, he was employed as a Grade 12 Industrial Specialist in the Planning and Engineering Branch of the Manufacturing Engineering Laboratory at the Center (J.A. 19). In his job, he worked side-by-side in the very same office in Building 4709 with several other civil service industrial specialists and with six other industrial specialist-contractor employees employed by Hayes International Corporation under private contract with NASA (J.A. 33). All of those employees performed "*exactly the same work*" for NASA (J.A. 34). Yet, under NASA's proposed reduction-in-force, four of the civil service industrial specialists were to be discharged and one was to be demoted, while the Hayes contractor employees were to continue to perform substantially the same work for the Government, and they were scheduled to succeed to and perform the work theretofore performed by Brouillette and his fellow civil service specialists (J.A. 19, 34).⁹

In the case of appellants Campbell and Ellett, they were employed as civil service aeromechanics in the Propulsion and Vehicle Engineering Laboratory when they received separation notices (J.A. 20). Like Brouillette, they worked side-by-side on a daily basis to perform the same work for NASA with numerous other mechanics employed by the Brown Engineering Company under contract with

⁹ As stated hereafter in this brief, albeit 598 of the 764 proposed RIF's were cancelled by NASA after this suit was filed, NASA arbitrarily and capriciously refused to cancel the RIF in Brouillette's case. Brouillette was the President of Appellant Lodge 1858.

NASA (J.A. 20). Nevertheless, they were scheduled for discharge while those non-civil service contractor mechanics were scheduled to be retained to succeed to and perform the same work theretofore performed by appellants Campbell and Ellett (J.A. 20).

Substantially identical allegations appear in the complaint with regard to appellants Easter, Gunter and Roden (J.A. 20, 21). In the Easter case, all non-supervisory civil service mechanics were scheduled for removal in the reduction-in-force, but their civil service supervisors were to be retained (J.A. 20). Upon the removal of the civil service mechanics, they were to be replaced by Brown Engineering mechanics, who would continue to work under the federal civil service supervisors (J.A. 20). In the Gunter case, he possessed 29 years of satisfactory federal service, when NASA proposed to remove him in favor of a contractor employee of the Hayes International Corporation (J.A. 21). Finally, in the Roden case, she was to be removed as a Computer Operator after 21 years of federal service at a time when the computer operations continued "around the clock" and when employees of Computer Sciences Corporation were to be retained to continue to perform her work (J.A. 22).¹⁰

Upon receipt of the said RIF notices, Lodge 1858 and the individual appellants appealed directly to appellee Webb, Administrator of NASA, and urged him to cancel the proposed illegal removals (J.A. 25). On December 12, 1967, appellee Webb's Personnel Director replied in writing as follows (J.A. 25):

"It is painful but necessary in some instances to use reduction-in-force procedures. In order to effect

¹⁰ The record before the Court shows that, albeit NASA cancelled 598 of the 764 RIF's after this suit was filed, it refused to cancel the RIF's for 5 of the 6 individual appellants (J.A. 191). Those appellants were thus capriciously separated or demoted by NASA when Judge Holtzoff vacated the Preliminary Injunction.

the economies required we must begin these as early as possible. Unfortunately, therefore, we have no alternative and must issue the . . . notices of the reduction-in-force at this time . . .

"We sincerely regret the adverse consequences which some of our employees may be required to face . . ."

Appellants thereupon appealed directly to appellee Macy, Chairman of the Civil Service Commission, and urged him to direct that these RIF's be cancelled by NASA in accordance with the directives contained in the aforementioned opinion of the Commission's General Counsel (J.A. 25). On December 12, 1967, however, the Commission, without giving any reasons and without expressing any logic to support its position, strangely refused to intervene in the matter (J.A. 25). Appellee Macy advised appellants by telegram that "the Commission was powerless to intercede . . . because NASA is solely responsible" (J.A. 25).

Appellants thereupon filed the instant action for declaratory and injunctive relief. They asked the District Court to declare, under the facts and circumstances alleged in the complaint and to be established in this case—

(1) That the reduction-in-force and the removal or demotion of the 764 civil service employees in the bargaining unit represented by Lodge 1858 were in violation of the collective bargaining agreement between NASA and Lodge 1858, and should therefore be enjoined (J.A. 28, 29);

(2) That NASA was prohibited by the 1958 NASA statute (42 U.S.C. 2473(b)(2)) and the federal personnel laws (Title 5, United States Code) from continuing to make, extend, renew or perform unlawful personnel "support contracts" at the Marshall Center pursuant to which private firms were furnishing non-civil service employees to perform "on-site" at the Center regular work and functions of the Government (NASA), side-by-side and in direct or indirect job competition with civil service employees of the United States; and under conditions whereby both

classes of employees were performing essentially the same duties at the same locations provided by the Government, with tools and supplies furnished by NASA and subject to overall direct or indirect supervision of the Government (J.A. 28);

(3) That the reduction-in-force and the removal or demotion of the 764 civil service employees here involved should thus be enjoined until NASA had the opportunity to remedy and eliminate all unlawful contractor personnel operations at the Center (J.A. 29, 30);¹¹

(4) That the reduction-in-force and the removal or demotion of the 764 civil service employees here involved should likewise be enjoined in all cases where it can be shown at the trial that NASA proposes to remove a federal civil service employee from his position at the Center and to replace him or assign his work, directly or indirectly, to a non-civil service contractor employee employed under an unlawful contract between NASA and a private firm or corporation (J.A. 29, 30).

Appellants immediately moved for a Preliminary Injunction to enjoin the reduction-in-force, which was scheduled to take effect on January 13, 1968 (J.A. 31). Appellees opposed that motion and the National Council of Technical Service Industries filed a motion for leave to intervene, which was granted (J.A. 56-78; 79-100; 167).

When the motion for preliminary injunction came on to be heard and after extensive argument, Judge Holtzoff stated, at J.A. 115:

"The Court: I might say I used to be a government employee for 21 years and this is the first time I have

¹¹ The record shows that most of the larger personnel support contracts at the Center were scheduled to expire by their own terms in March or April 1968—unless renewed by NASA (J.A. 105). Unfortunately, even during the pendency of this suit, NASA apparently renewed the said contracts and thus NASA again purposefully refused to comply with the directives received from the Comptroller General and the Civil Service Commission. (J.A. 106).

heard of government agencies on a large scale instead of hiring employees, contracting out for services to be performed in government departments. *You might as well do away with the Civil Service law if that practice is accepted.*" (Italics supplied)

And, at J.A. 122:

"The Court: I can understand contracting out research work, say, at a college laboratory, you wouldn't hire Civil Service employees. But here is a government agency in a government building, I am astounded that instead of hiring employees under the Civil Service and other Acts, it makes a contract with a contractor to furnish the services and he brings in his own employees. Isn't that a violation of the Civil Service law on its very face?"

And, at page 124 of the Joint Appendix:

"The Court: I would say that even without that opinion (of the General Counsel to the Civil Service Commission) such a plan of operating a Government department is illegal."

Finally, Judge Holtzoff, on January 11, 1968, granted the preliminary injunction and rendered the following opinion at J.A. 152, 153:

"This Court has frequently had occasion to emphasize the well established doctrine, and to apply it vigorously, that the courts should not ordinarily interfere with the day-to-day operations of Government departments *unless it is clear that some illegal act is being committed*, and the courts then may intervene *only to prevent the continuance of the illegal act*.

"In this case, however, there is a very unusual situation. There are discussions, perhaps overtones of a *bona fide* disagreement, between the employing agency and the Civil Service Commission as to the extent to which the Government agency may cause its activities to be performed under contract instead of by the Civil Service employees. Discussions apparently

between the two agencies have been conducted since October and are now in process.

"The Court is of the opinion that it is proper for the Court to grant a temporary injunction to restrain the separation from the service of the employing agency of those employees who have a permanent Civil Service status, until these negotiations come to a conclusion *or until administrative remedies are exhausted by the employees . . .*

"Accordingly, the Court will grant a temporary injunction enjoining NASA from severing from employment any of those persons who are represented by the plaintiff who have received notices of termination and who have a permanent Civil Service status, *until their administrative remedies are exhausted* or until the agencies involved in this case, that is NASA and the Civil Service Commission, reach a definitive conclusion as to the extent to which Civil Service employees may be dispensed with in the performance of the functions of NASA.

"If, however, any employee who is protected by the injunction should use dilatory tactics or interpose any delays *in the exhaustion of administrative remedies*, the Court will, on application, vacate the injunction as to him." (Italics supplied)

It was perfectly obvious at the time Judge Holtzoff entered the last mentioned opinion on January 11 and when he executed the Preliminary Injunction on January 15, 1968 that the two Government appellees in this case (NASA and CSC) intended to move swiftly, unilaterally and arbitrarily to attempt to sweep the ugly contract illegalities presented hereby "under the rug", and thus to deny appellants their day in Court on the merits of this action (J.A. 154, 171, 172). After the Court rendered its opinion on Thursday, January 11, representatives of NASA and the Civil Service Commission "worked over the week-end" to prepare findings of fact and a form of injunction which would enable those two agencies, *acting privately and alone*,

arbitrarily to settle all of the legal issues raised by the complaint herein (J.A. 171, 172; 177-183). NASA and the intervenor, National Council of Technical Service Industries (the trade association and lobbyist for the personnel contractors at the Center), were especially anxious to shield NASA's private personnel contracts from judicial scrutiny and determination (J.A. 58-64; 79; 85-87).

Accordingly, it was not surprising that within a month after the Preliminary Injunction was signed by Judge Holtzoff, NASA and the Commission reached a brief, four paragraph agreement entitled "*NASA-CSC Agreement on the MSFC Reduction-in-Force*" (J.A. 188, 189). That agreement was made and presented to the Court before any step of any kind was taken by the Civil Service Commission to hear any of the civil service employee RIF appeals, *most of which had been pending since early December, 1967* (J.A. 66-76). The sole purpose of that agreement was to give the District Court something upon which it might rely to vacate the preliminary injunction and dismiss the complaint before any of those administrative appeals were heard (even at the regional level) by the Commission (J.A. 185-189).

In any event, the NASA-CSC agreement arbitrarily and capriciously provided (J.A. 189)—

- 1) That of the 764 reduction-in-force notices originally issued by NASA, 598 would be permanently cancelled. Of the 166 not cancelled, 56 employees would still have to be separated; 110 reduced in grade and pay.

- 2) That of the 598 notices cancelled, 150 involved "blue collar" employees who would have to be retrained for replacement in other jobs.

- 3) That of the 598 notices cancelled, 69 technicians would still have to be reassigned to other NASA centers.

4) That upon "lifting of the injunction", the reduction-in-force would proceed immediately as to all employees still affected.

At no point was it represented in said Agreement or otherwise that NASA had taken any effective step to eliminate the illegal contract practices about which the Commission had theretofore complained; *nor was it explained why those employees still to be discharged or demoted pursuant to the agreement were to be afforded no relief whatsoever, while contract illegalities required cancellation of 598 of the original 764 personnel actions.*

In fact, the record before the Court contains allegations that NASA, bent on obtaining the Commission's quick, easy approval of the proposed settlement agreement, actually misrepresented to the Commission's General Counsel some of the pertinent material facts which allegedly supported that agreement (J.A. 190-192). One of those misrepresentations was that the "6 individual plaintiffs to this action would definitely be among the 598 employees whose RIF notices would be cancelled" (J.A. 190). Another was that none of the 166 employees still to be separated or demoted "had any involvement whatsoever in improper service contract operations" (J.A. 190). When the supporting list of names was finally produced by NASA *after the NASA-CSC Agreement was executed*, however, it became clear that NASA's said representations were *not true and correct* (J.A. 191). *Those lists showed that most of the individual appellants were definitely among the 166 to be discharged or demoted*, and that numerous other Civil Service employees at the Center, who were clearly subject to improper contract operations, were also among the 166 unfortunate employees still to be discharged or demoted (J.A. 191).

Indeed, when the last mentioned facts were brought to the attention of the Commission's General Counsel after

the NASA-CSC Agreement was executed, he expressed shock and surprise that NASA would so attempt to administer the said agreement (J.A. 191, 192).

In spite of the foregoing, counsel for NASA and the Commission in the court below insisted on pressing appellees' motion to vacate the preliminary injunction (J.A. 192). Judge Holtzoff was, at that time, sitting temporarily in the United States District Court in Miami, Florida (J.A. 192). When appellees insisted on presenting their motion to him in Miami, appellants opposed, stating it would be necessary to present testimony and evidence to demonstrate why the Court should not vacate the Preliminary Injunction with reference to the individual appellants and the 161 other civil service employees who would still be discharged or demoted under the arbitrary and capricious terms of the NASA-CSC Agreement (J.A. 192). Appellants thus urged both the Court and appellees that the motion be referred to some other Judge here in the District, or that the hearing be delayed until Judge Holtzoff returned to Washington (J.A. 192).

Judge Holtzoff, however, while still sitting in Florida, rejected appellants' request for a hearing and without even oral argument, he summarily granted appellees' motion to vacate the preliminary injunction (J.A. 197). In a brief memorandum dated March 9, 1968, he ruled:

"In view of the agreement reached by the Civil Service Commission and the National Aeronautics and Space Administration, the preliminary injunction heretofore granted is hereby vacated without prejudice to any administrative remedies that may be possessed by individual employees."

Upon his return to Washington, Judge Holtzoff likewise granted appellees' motion to dismiss the complaint (J.A. 215-218). He ruled: "*There is no such thing as a col-*

lective bargaining agreement with a Government department that is binding . . ." (J. A. 212).

And, at J.A. 217, Judge Holtzoff stated, in the course of his opinion pursuant to which the complaint herein was dismissed:

"The Court is of the opinion that the complaint does not set forth a valid claim for relief because the Court may not enjoin a Government agency from discharging any of its employees, nor may it issue a declaratory judgment.

"In addition, the doctrine of exhaustion of administrative remedies is peculiarly applicable in such a case and these remedies must be exhausted by individual employees affected adversely and only after the remedies are exhausted may relief be asked from the courts.

"The fact that this Court at one time granted a preliminary injunction, which has since been vacated, does not affect the conclusion which the Court reaches . . .

"It is apparent that the Civil Service Commission has completed its investigation and that the employing agency has apparently yielded to certain views of the Civil Service Commission *by withdrawing a majority of the notices involved in this case . . .*

"The motion to dismiss is granted . . ." ¹² (Italics supplied)

As a result of Judge Holtzoff's action, approximately 166 federal employees fell victim to NASA's illegal reduc-

¹² The Court granted the motion to dismiss even though it was advised by counsel for appellees that the Civil Service Commission had thus far failed even to conduct a hearing "*at the first Civil Service level*" on the individual appellants' administrative appeals (J.A. 204); and even though counsel for appellees conceded that "a simple declaration (of legal rights) by the Court, if the Court keeps this case, would meet the needs of the situation" with regard to the 166 employees still subject to NASA's RIF (J.A. 204). Counsel for appellee stated: "If the courts ultimately determine that their rights have been violated, they would be reinstated . . ."

tion-in-force. And, when their administrative appeals reached the Civil Service Commission's Regional Office in Atlanta for decision, that office, after receiving directions from the Commission in Washington, ruled and decided, on July 18, 1968, *that the Commission had no authority whatsoever to determine whether a civil service employee's removal or demotion was tainted or affected by NASA's unlawful personnel contracts and arrangements at the Center.* Copies of the decisions rendered upon the administrative appeals of appellants Brouillette and Roden are printed in the Appendix to this brief. More specifically, the Commission ruled as follows in the Roden case:

"The appellant has submitted that the reduction-in-force action in her case resulted from or was affected by contracting-out practices of the employing agency which she alleges are improper. The issue of whether or not any contract between NASA and a private firm is improper or has resulted in the procurement of personal services in violation of the Federal personnel laws is a matter that is *irrelevant to, and not for decision in, a reduction-in-force appeal.* The reason for this is the fact that regardless of the validity of any contract entered into by NASA, the reduction-in-force rights of Government employees at NASA cannot be affected, for even if such a contract is improper, the employees of the private contractor could not be "competing employees" under the law and the Civil Service regulations (5 U.S.C. 3502; 5 CFR 351.203(a)). No employee of the Government could displace or "bump" an employee of a private firm as no law or regulation exists that would require or allow such a result. *Nevertheless, to be of assistance in this area, we have placed the appellant's views of support-contract inequities before NASA for its administrative consideration.*" (Italics supplied)

Obviously, the Commission erroneously or intentionally completely missed the point raised by these remaining administrative appeals. The question raised by these cases was *not* whether an "employee of the Government could properly displace or "bump" an employee of a private

firm". On the contrary, the question presented by these cases was: *Can a federal civil service employee be lawfully displaced or "bumped" from his position by employees of a private firm illegally employed by NASA pursuant to a contract which is in violation of Federal law?*

The Commission, of course, failed and refused to answer that latter question, which lies at the very heart of these cases, when it denied the long-delayed administrative appeals and capriciously advised the appellants:

"Nevertheless, to be of assistance in this area, we have placed appellant's views of support-contract inequities before NASA for its administrative consideration."

In essence, therefore, this case presents the ugly picture of two Federal agencies getting together, after they have been enjoined by a Federal Court, to cancel 598 out of 764 reduction-in-force actions because those 598 were concededly "*affected by improper or illegal contracting-out practices*", while they simultaneously advise the remaining 166 civil service employees: "The issue of whether or not any contract between NASA and a private firm is improper or has resulted from the procurement of personal services in violation of the Federal personnel laws is *irrelevant . . .*"

These arbitrary, discriminatory procedures, we submit, demonstrate more clearly than ever before why the complaint in this case states a cause of action for determination by the courts in the Federal system—a cause of action which was erroneously dismissed by the court below; a cause of action which constitutes appellants' only available hope for relief.

SUMMARY OF ARGUMENT

I

The District Court erred by dismissing the complaint on the ground it had no jurisdiction to entertain an action for declaratory judgment and injunctive relief with regard to NASA's alleged breach of its collective bargaining agreement with Lodge 1898. That contract is typical of those made in private industry, and on the face thereof, NASA signified its intent "to be bound" thereby. Indeed, the history and legal authorizations which made it possible for NASA to make that contract in the first place demonstrate that such agreements were to enjoy substantially the same enforceable contract status afforded to collective bargaining agreements in private industry (*Collective Bargaining Agreements In The Federal Service*, BLS Bulletin 1451; 5 U.S.C. 7301; Executive Order 10988 entitled *Employee-Management Cooperation In The Federal Service*, 27 Fed. Reg. 551).

It would thus destroy the effectiveness of the entire collective bargaining system in the Federal Service if this Court approves the faulty reasoning applied by the District Court and harnesses collective bargaining contracts to which Government agencies are parties with the old, rejected logic which used to prevail at *early common law* with regard to labor agreements generally. Under those ancient rules, labor agreements were not regarded as "contracts", but as unenforceable "treaties" or "rules of the industry" (*Williston on Contracts*, 3rd Ed., Vol. 9, pg. 246-247). Today, however, these ancient rules have been thrown aside and a labor contract is enforced on the same basis as all other contracts (*Williston on Contracts*, 3rd Ed., Vol. 9, pg. 250, 251). In this connection, the Supreme Court has consistently ruled that a collective bargaining agreement "is more than a contract" (*Steelworkers v. Warrior and Gulf Co.*, 363 U.S. 574, 578); and that "present federal policy is to promote industrial stabilization through the collective bargaining agreement" (*Textile Workers v.*

Lincoln Mills, 353 U.S. 448, 453). Accordingly, the Supreme Court has instructed other courts in the federal system that collective bargaining agreements generally, even in the absence of express statutory authority and substantive rules of law, should be enforced as the best available means of enhancing good, workable labor-management relations (*Retail Clerks v. Lion Dry Goods Co.*, 369 U.S. 17, 28; *Textile Workers v. Lincoln Mills*, *supra*; *Dowd Box Co. v. Courtney*, 368 U.S. 502). The courts have been directed "to fashion a body of federal substantive law" for application in suits brought to enforce labor agreements.

Thus, appellants contend that instead of refusing to enforce collective bargaining agreements in the Federal Service, as the District Court did in the case below, the logic and reasoning of *Lincoln Mills* and *Warrior and Gulf* and the purposes and public policy sought to be attained by the President's regulations (Executive Order 10988) under 5 U.S.C. 7301 require a completely opposite result in this action.

II

Moreover, inasmuch as the complaint in this case is based on a written collective bargaining agreement, and on NASA's alleged violation of its own 1958 organic statute and the federal personnel laws, and on NASA's alleged violation of Section 6(b) of Executive Order 10988 and breach of its own regulations (NPC 401), the action here is not barred by this Court's decisions in *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451, cert. denied 382 U.S. 978, and *National Association of Internal Revenue Employees v. Dillon*, 356 F. 2d 811. Jurisdiction was denied in those cases because, in substance, the plaintiffs alleged merely that the agencies involved had misconstrued or erroneously applied some of the provisions of Executive Order 10988.

In recent decisions by other courts, the "net tendency" has been to recognize collective labor agreements in the

Federal Service and to enforce same, if such enforcement would be effective and useful (*Morris v. Steele*, D.C. Mass. 1966, 253 F. Supp. 769; *Hicks v. Freeman*, D.C.N.C. 1967, 273 F. Supp. 334). And, of course, enforcement in this case would not only be effective and useful; indeed, it represents the only possible relief available to appellants.

III

But even absent the collective bargaining agreement in this case, the district court still had jurisdiction to continue to entertain the reduction-in-force suit on behalf of the individual appellants and to render a decision on the merits, because from the very outset it was clear that the individual appellants had no effective or adequate administrative remedy to exhaust before the Civil Service Commission (*Reynolds v. Lovett*, CCA, D.C. 1951, 201 F. 2d 181, cert. denied, 345 U.S. 926; *Roth v. Brownell*, CCA, D.C. 1954, 215 F. 2d 500, cert. denied, 75 S. Ct. 89; *Wolff v. Selective Service Board*, 372 F. 2d 817, 825).

In any event, the district court, in accordance with its own original ruling on the Preliminary Injunction, should have preserved the status quo by retaining jurisdiction over this action and by continuing the injunction in effect pending completion of the administrative proceedings before the Commission (*Group v. Finletter*, D.C. D.C. 1952, 108 F. Supp. 327; *Wettre v. Hague*, CCA 1, 1948, 168 F. 2d 825; *Reeber v. Russell*, D.C. N.Y. 1950, 91 F. Supp. 108; *Farrell v. Moumau*, D.C. Cal., 1949, 85 F. Supp. 125).

IV

The Court erroneously allowed National Council of Technical Service Industries to intervene (Rule 24, Federal Rules of Civil Procedure; and cases cited at Point IV).

ARGUMENT

POINT I

The District Court Erred by Dismissing the Complaint on the Ground It Had No Jurisdiction To Entertain an Action for Declaratory Judgment and Injunctive Relief With Regard to NASA's Alleged Breach of Its Collective Bargaining Agreement With Appellant, Lodge 1858

As stated above, Judge Holtzoff dismissed the cause of action asserted on behalf of Lodge 1858 in this case on the ground "There is no such thing as a collective bargaining agreement with a Government department that is binding . . ." (J.A. 211, 212); and "A collective bargaining agreement between a union and a Government agency is an entirely different type of document than a collective bargaining agreement between a labor union and a private employer" (J.A. 212).

Appellants submit that these rulings and the judgment of dismissal predicated thereon are patently erroneous and wrong, and if they are allowed to stand by this Court, the most basic foundations which support the new labor-management relations program in the Federal Service will crumble and fall, and that entire program will become meaningless and ineffectual.

The collective bargaining agreement involved in this case is printed in its entirety at pages 219-247 of the Joint Appendix. In every respect it constitutes an easy-to-recognize, typical collective bargaining contract between Management (NASA), on one hand, and a duly recognized Union (Lodge 1858), on the other (J.A. 219). In this connection, the term "*collective bargaining agreement*" has been very simply defined by Ludwig Teller in his work entitled "*Labor Disputes and Collective Bargaining*" (Vol. 1, pg. 476) as follows:

"The collective bargaining agreement has been variously interpreted, but its essential nature is the subject of general understanding. It may be broadly

defined as an agreement between a single employer or an association of employers on the one hand and a labor union upon the other, *which regulates the terms and conditions of employment.*" (Italics supplied)

In the Preamble to the contract between NASA and Lodge 1858, it is stated that "the intent and purpose of the parties to this *Agreement* is . . . to establish a *basic understanding* relative to the personnel policy, practices and procedures, and other matters affecting *conditions of employment* . . ." (J.A. 219, 220). Thus, NASA and Lodge 1858 established from the very outset that they were desirous of making and performing a regular, binding *collective bargaining contract* within the scope of the very simple definition set forth above.

Moreover, while Judge Holtzoff doubted that there is any such thing as a collective bargaining agreement which can be "*binding*" on a Government department, the collective bargaining agreement between NASA and Lodge 1858 specifically provides on its face, at the end of the Preamble (J.A. 220):

"In consideration of the mutual covenants herein set forth, the parties hereto, *intending to be bound hereby*, agree as follows: —"

The said contract then goes on to set forth a series of agreements which are typical of collective bargaining contracts regularly made between private industrial employers and industrial unions. Article II of the contract describes the bargaining unit for which the contract is made and which is to be covered thereby (J.A. 220). Article V deals with "Union Representation" of employees in their relations with Management (J.A. 223). Article VI recites provisions to govern "Employee complaints and grievances" (J.A. 225). Articles VII and VIII deal with how "annual leave" and "sick leave" shall be administered (J.A. 230, 231). Article IX governs "Excused absence for

registration and voting" (J.A. 233). Article X deals with absences because of weather conditions (J.A. 234). Article XI establishes the "basic workweek" and how it is to be administered (J.A. 235). Article XII deals with the distribution and administration of "overtime" (J.A. 236). Article XIII sets forth provisions to govern "rest periods", while Article XIV deals with "clean-up time" (J.A. 237). Article XV governs "shift operations"; Article XVII, "employee training"; Article XVIII, "merit placement and promotion"; Article XIX, "within grade increases" and so on (J.A. 238-247).

Accordingly, appellants submit that Judge Holtzoff was clearly in error when he ruled that "A collective bargaining agreement between a union and a Government agency is an entirely different type of document than a collective bargaining agreement between a labor union and a private employer". Indeed, with the possible exception of wage provisions (wages in the federal service being fixed by Congress), the collective bargaining agreement in the case at bar is essentially similar, in both form and substance, to the type of collective bargaining agreements regularly and universally made and enforced between employers and labor unions in private industry.

In fact, when one examines the history and legal authorizations which made it possible for NASA and Lodge 1858 to enter into this agreement in the first place, it becomes crystal clear that such authority was granted by the President, *under the provisions of 5 U.S.C. 7301*, so that federal employees and their unions could become parties to regular collective bargaining agreements and thus enjoy *substantially the same labor contract rights as those possessed by industrial unions and employees in private industry for years*. In a publication entitled "*Collective Bargaining Agreements In The Federal Service*" (Bureau of Labor Statistics, Bulletin No. 1451), the United States Department of Labor briefly traces the history which finally

led to collective labor contracts in the Federal Service as follows, at page 2:

"Union activity in the Federal Service, it should be emphasized, is not a recent development. Organizations of blue collar workers in Government installations existed in the 1830's and 1840's and contributed to efforts to reduce daily hours of work to 10 and, subsequently, to 8. At the urgings of union leaders, Congress passed the first "prevailing wage" statute in 1861. Postal unions were founded in the 1880's and 1890's. As a result of growing union activity among Federal blue collar workers, the International Association of Machinists, in 1904, chartered a separate division for such members, known as District 44. (Members of IAM's District 44 and of the Metal Trades Department have for a number of years served on the Navy Wage Committee which reviews data on local prevailing wage rates and determines area pay scales for each craft). Four years later, a number of unions affiliated with the American Federation of Labor established . . . local metal trades councils to coordinate representation and *bargaining* efforts . . . The right of Federal employees to join unions and to petition Congress was established by the Lloyd-LaFollette Act of 1912 . . .

"The first general union of civil servants, the National Federation of Federal Employees, was formed in 1917 . . . In 1932, local unions . . . formed the American Federation of Government Employees. Both unions are still in existence."

The Department of Labor's publication then goes on to state that, in June, 1961, President Kennedy appointed a Task Force "to advise him on employee-management relations in the Federal Government." That Task Force consisted of Secretary of Labor Goldberg, the Chairman of the Civil Service Commission, the Director of the Budget Bureau, the Postmaster General, the Secretary of Defense and Special Counsel to the President Sorenson. The Task Force, after an extensive survey, found that various

agencies of the Government already had established extensive relations with federal employee unions.¹³ For example, it was found that 82% of all employees of the Tennessee Valley Authority were organized into unions; and that TVA had actually made collective bargaining contracts with 16 craft unions represented by the Valley Trades and Labor Council since 1937, and with 7 white-collar unions . . . since 1943.¹⁴ The Department of the Interior was already a party to 24 collective bargaining contracts as of the end of 1961, covering employees on the Alaska Railroad, the Bureau of Reclamation, Bonneville Power Administration, Bureau of Mines . . . and powerplants run by the Bureau of Indian Affairs and Southwestern Power Administration.¹⁵

Accordingly, the Task Force concluded in its Report to President Kennedy dated November 30, 1961:¹⁶

"The absence of Presidential policy at this late date is an unnecessary situation; in many ways it is an anomalous one. For a quarter of a century it has been the public policy of the Government to encourage employees in private enterprise to organize and deal collectively; yet the Government continues to have almost nothing to say concerning the role of organizations of its own employees . . .

"The Civil Service system has provided an excellent and, indeed, indispensable method of selecting government employees and rewarding their achievements. However, it has not, on the whole, provided a means by which employees acting in concert may promote the collective interests of civil servants. In this light it is clear that the systems are both mutually compatible, and in fact complement each other."

¹³ BLS Bulletin 1451, pg. 1.

¹⁴ BLS Bulletin 1451, pgs. 2, 3.

¹⁵ BLS Bulletin 1451, pg. 3.

¹⁶ BLS Bulletin 1451, pg. 3.

In line with the recommendations contained in the Task Force Report, President Kennedy, in January, 1962, promulgated Executive Order 10988 entitled *Employee-Management Cooperation In The Federal Service* (27 Federal Reg. 551). That Executive Order, a *regulation* issued by the President of the United States, was made pursuant to 5 U.S.C. 7301, which provides:

"Presidential regulations.

The President may prescribe regulations for the conduct of employees in the executive branch."

The Executive Order issued by the President provided for three forms of "recognition" to be extended by Government agencies to federal employee unions: (1) *Informal recognition* entitles any organization "to be heard on matters of interest to its members", but the agency is under no obligation "to consult" with such organization on personnel policy; (2) *Formal recognition*, which entitles unions having at least 10% membership among the employees in a given unit the right "to consult" with Management on matters relating to working conditions and personnel policies; and finally, (3) *Exclusive recognition*, which entitles a union selected by a majority of the employees in a unit to "represent all employees in the unit and to negotiate collective bargaining agreements".¹⁷ More particularly with regard to collective bargaining agreements such as the one involved in the case at bar, Section 6(b) of Executive Order 10988 states:

"(b) When an employee organization has been recognized as the exclusive representative of employees of an appropriate unit, it shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees . . . Such employee organization shall be given the opportunity to be repre-

¹⁷ BLS Bulletin 1451, pgs. 3, 4.

sented at discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit. *The agency and such employee organization, through appropriate officials and representatives, shall meet at reasonable times and confer with respect to personnel policy and practices and matters affecting working conditions, so far as may be appropriate subject to law and policy requirements. This extends to the negotiation of an agreement, or any question arising thereunder, the determination of appropriate techniques . . . to assist in such negotiation, and the execution of a written memorandum of agreement or understanding incorporating any agreement reached by the parties . . .* (Italics supplied).

Section 7 of Executive Order 10988 provides that "Any basic or initial agreement entered into with an employee organization as the exclusive representative of employees in a unit must be approved by the head of the agency or any official designated by him"; and Section 15 of the Executive Order states:

"Nothing in this order shall be construed to annul or modify, or to preclude the renewal or continuation of, any lawful agreement heretofore entered into between any agency and any representative of its employees . . ."

The Labor Department's publication "Collective Bargaining Agreements In The Federal Service" states, at page 7, that by the summer of 1964, 209 collective bargaining agreements were already in effect in the Federal Service covering 599,737 federal employees, 492,542 of whom were Classification Act civil service employees and 62,635 of whom were blue-collar civil service employees. Since 1964, the number of such agreements and the numbers of federal employees covered thereby have continued to grow swiftly and continuously.

Consequently, as a basic proposition, it seems perfectly clear that there is little real difference in purpose, scope, substance, form or effect between collective bargaining agreements in private industry and collective bargaining agreements made in the federal service. Both regulate labor-management relations and working conditions and, like all other contracts, both establish binding rights and obligations for the employer, on one hand, and for the union and the employees it represents on the other.

Considering the historical reasons, legal bases and lofty purposes pursuant to which the right to make collective bargaining agreements was extended by Presidential regulation to the Federal Service and considering the vast body of public policy which supports the full recognition and enforcement of collective bargaining agreements generally, it would be regrettable and disastrous if this Court approved the faulty reasoning applied by Judge Holtzoff in the case below and thus harnessed collective bargaining in the Federal Service with the old, rejected, toothless logic which used to prevail at *early common law* with regard to the enforcement of collective labor agreements. Under those ancient rules, collective labor agreements were not regarded as "*contracts*", but as "*trade agreements*" or "*treaties*", which merely formulated customs and usages or the "*rules of the industry*" (*Williston on Contracts*, 3rd Ed., Vol. 9, pg. 246-247). Williston goes on to state, however, that "in the great majority of jurisdictions, collective labor agreements have gradually achieved the status of contracts", and even at common law today, "a labor contract is to be treated like any other" (*Williston on Contracts*, 3rd Ed., Vol. 9, pg. 250, 251).

Indeed, in recent years, the Supreme Court of the United States has made it abundantly clear that a collective bargaining agreement "*is more than a contract*" (*Steelworkers v. Warrior and Gulf Co.*, 363 U.S. 574, 578); and that the "present federal policy is to promote industrial stabiliza-

tion through the collective bargaining agreement" (*Textile Workers v. Lincoln Mills*, 353 U.S. 448, 453, 454). In *Steelworkers v. Warrior and Gulf Co.*, *supra*, the Court expressed its broader view of a collective bargaining agreement in this manner, at pages 578, 579:

"The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a general code to govern the myriad of cases which the draftsman cannot wholly anticipate . . . The collective agreement covers the whole employment relationship . . ."

Regarding the need and desirability for effective federal court enforcement procedures in suits involving the failure of a party to a collective bargaining agreement to comply with the provisions of that contract the Supreme Court stated in *Retail Clerks v. Lion Dry Goods Co.*, 369 U.S. 17, 28 and in *Textile Workers v. Lincoln Mills*, *supra*, at page 455:

"Federal courts should enforce these agreements on behalf of or against labor organizations and . . . industrial peace can best be obtained in that way." ¹⁸

Indeed, in *Textile Workers v. Lincoln Mills*, *supra*, the Supreme Court stated (at 353 U.S. 456, 457) that courts in the federal system should exercise "judicial inventiveness" to guarantee that collective bargaining contracts are "equally binding and enforceable on both parties"; and it directed the federal courts "to fashion" a body of federal substantive law for application in suits brought for

¹⁸ The same rule is expressed in another way in *Williston on Contracts*, 3rd Ed., Vol. 9, pgs. 253, 254: "Even in the absence of statute, the desirability of giving such agreements obligatory force (is) recognized." See also: *Dowd Box Co. v. Courtney*, 368 U.S. 502, where the Supreme Court stated that, even absent Section 301 of the Taft-Hartley Act, federal courts enforced collective bargaining contracts in proper cases, and that regardless of Section 301, State courts were empowered and encouraged to enforce such contracts. Thus, the rules established by the Supreme Court are, in no respect, entirely dependent on Section 301 of Taft-Hartley.

the enforcement of such contracts. In this connection, the Court stated, at page 457:

"It is not uncommon for federal courts to fashion federal law where federal rights are concerned."

In the case at bar, the rights of scores of employees of the Federal Government, all of whom are covered by an effective collective bargaining agreement with NASA, are clearly at stake. The time and the opportunity have thus arrived where the federal courts, in line with the logic and reasoning of *Lincoln Mills* and *Warrior and Gulf*, which made industrial labor contracts fully enforceable, should now exercise judicial inventiveness to *fashion a body of federal law which will require parties to collective bargaining agreements in the Federal Service, like parties to collective bargaining agreements in private industry, to comply with those contracts as they originally agreed to do*. In the case at bar, the ingredients for such relief are readily available as follows:

(1) The Court might start with 5 U.S.C. 7301, an Act of the Congress which authorizes the President to prescribe "regulations for the conduct of employees in the executive branch".

(2) The Court might next turn to the "regulations" the President adopted in 1962 and embodied in the provisions of Executive Order 10988, especially those provisions of Section 6(b) which authorize the execution and performance of collective bargaining agreements by the various agencies of the Government. Clearly, those regulations contemplate that once an agency enters into a written collective bargaining agreement pursuant to Sections 6(b) and 7, the agency is thereafter obligated to adhere to and perform the terms and conditions of that contract, just as it would be obligated to perform any other contract it was authorized by statute or regulation to make in the first place.

(3) The Court should also give force and effect to Section 6(b) of the Executive Order (the President's regulations)

pursuant to which NASA had the absolute duty to "meet . . . and confer with respect to personnel policy and practices and matters affecting working conditions" *and with respect to "any questions arising" under the collective bargaining agreement previously made with Lodge 1858*. The Complaint in this case alleges that NASA violated those requirements of the regulations, as indeed, it violated the Articles of the collective bargaining agreement itself entitled "Reduction In Force", "Merit Placement", and "Contracting" (J.A. 22, 23; 219-245). Thus, in this case, NASA's actions violated both the regulations *and* the contract. Under these circumstances, the District Court has jurisdiction to entertain this action under the rule of *Service v. Dulles*, 354 U.S. 363, *Vitarelli v. Seaton*, 359 U.S. 535 and *Connelly v. Nitze*, CCA, D.C. 1968 (No. 21,085, decided August 15, 1968) pursuant to which agency personnel actions, accomplished in violation of the letter or spirit of applicable regulations, are invalid and void.

(4) In the course of fashioning a body of federal law to govern enforcement of collective labor contracts in the Federal Service, the Court might likewise turn to the provisions of the Declaratory Judgment Act, 28 U.S.C. 2201, which empower the district courts to "declare the rights and other legal relations" of parties to a valid contract—"whether or not further relief is or could be sought".

(5) Finally, the Court might also utilize the provisions of 28 U.S.C. 1361, which empowers the district courts to entertain "any action in the nature of mandamus to compel an officer or employee of the United States *or any agency thereof* to perform a duty owed to the plaintiff"—in this case, of course, the duty being NASA's obligations to adhere to and perform the terms of the said collective bargaining contract and to comply particularly with those provisions of the contract contained in Article XVIII (Merit Placement) and Article XXVII (Contracting).

In conclusion, it should be understood that the granting of full judicial relief on the merits in this case is absolutely

essential because the collective bargaining contract here, unlike the contracts involved in *Lincoln Mills* and *Warrior and Gulf*, *supra*, contains no provision for arbitration. Under Article XXIX of the contract, entitled "Compliance with Agreement", matters "which involve failure of the . . . Employer to comply with the provisions of this Agreement (are to be) referred for resolution to the Personnel Officer and the President of the Union" (J.A. 246). The record shows that when Lodge 1858 referred the matter to Management in this instance, Management summarily replied that it intended to proceed forthwith with the reduction-in-force (J.A. 25), thus remitting Lodge 1858 to this action as its sole means of relief under the contract. Accordingly, while the basic dispute here presented (*illegal contracting out and reduction-in-force*) is almost identical to the dispute involved in *Warrior and Gulf*, *supra*, the relief here must be entirely judicial, whereas the relief granted by the Supreme Court, under the terms of the contract in *Warrior and Gulf*, was arbitration.

POINT II

The Complaint Here, Based on the Collective Bargaining Contract and NASA's Violation of Federal Statutes, and Breach of the President's and Its Own Regulations. Is Not Barred by This Court's Decisions in *Postal Union v. Gronouski* and *NAIRE v. Dillon*

The complaint in this case, based as it is on the collective bargaining contract, and on NASA's alleged violation of its own organic statute and the federal personnel statutes, and NASA's breach of the President's regulations (Executive Order 10988) and its own regulations (NPC 401), is not barred by this Court's decision in *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451, cert. denied 382 U.S. 978, and *National Association of Internal Revenue Employees v. Dillon*, 356 F.2d 811.

Neither of the last mentioned cases was grounded on the agency's breach of contract, or on the agency's alleged

violation of federal law, or on the agency's breach of Executive Order 10988 itself, or on the agency's breach of its own regulations. Thus, in *Manhattan-Bronx Postal Union*, this Court ruled, at page 455:

"They do not claim that his (the Postmaster General's) adoption of and adherence to the 60% rule is in violation of Executive Order 10988 . . .

"... The short of appellant's case is that appellee has misconstrued the President's instructions, and the law is clear that an officer of the United States does not act outside his authority whenever he acts upon an erroneous decision of law or fact, if he is empowered to make the decision . . ."

And in the *NAIRE* case, this Court stated, at page 812:

"But, as we said in *Manhattan-Bronx*, if the Secretary of the Treasury is incorrectly interpreting the President's personnel policies as manifested in Executive Order 10988, correction of that error, if such it be, must be sought in a quarter other than the District Court."

Here, the short of appellants' case is that appellee Administrator of NASA has illegally, arbitrarily and capriciously removed or discharged a large body of federal civil service employees and has displaced them with non-civil service employees obtained under personnel contracts which violate the 1958 NASA statute and the federal personnel laws; that the Administrator of NASA has so acted in violation of provisions of the collective bargaining contract with Lodge 1858, and in violation of Section 6(b) of Executive Order 10988 and of the sense and spirit of his own regulations (NPC 401).

In no sense, therefore, does this action fall within the ambit of the rule established by *Manhattan-Bronx* and *NAIRE*, and to the extent Judge Holtzoff relied on those decisions to dismiss the complaint in this action, he erred.

In two decisions rendered by other courts since the *Manhattan-Bronx* and *NAIRE* cases were decided by this Court, the net tendency has been to recognize and uphold collective bargaining contracts in the federal service if, under the terms of the contract involved in any given case, such enforcement might result in decisive relief above and beyond mere "*further consultation*" between an agency and union (*Morris v. Steele*, D.C. Mass., 1966, 253 F. Supp. 769; *Hicks v. Freeman*, D.C. N.C. 1967, 273 F. Supp. 334). In the case at bar, enforcement of the contract would clearly result in decisive relief to the appellants. Here, matters reserved for mere "*consultation*" are specified in Article IV of the contract (J.A. 222). However, the purpose of this action is to gain enforcement of those additional provisions of the contract which *preclude* unlawful reductions-in-force (Article XVI, J.A. 239); which *require* that "existing vacancies be utilized to the maximum extent to place employees in continuing positions who otherwise would be separated from the service (Article XVI, J.A. 239); which require the Employer (NASA) "to maintain a career service which affords maximum opportunity for continuity of employment" (Article XVIII, J.A. 241); which requires the Employer "to conform to appropriate Civil Service Commission and agency regulations in re-assignments, changes to lower grade, and transfers" (Article XVIII, J.A. 241); and which require the Employer to curtail contracting out in every possible manner "to minimize displacement by taking every possible prudent action to retain career employees" (Article XXVII, J.A. 245).

POINT III

In This Case Wherein 598 of the 764 Proposed Reductions-in-Force Were Admittedly Unlawful and Were Voluntarily Cancelled and Wherein the Civil Service Commission Has Continuously Taken the Position It Has No Jurisdiction To Determine the Legal Issues Raised by This Suit Upon Individual Appellants' Administrative Appeals, the District Court Erred by Dismissing the Complaint and Vacating the Preliminary Injunction Until the Individual Appellants Exhausted Their Fruitless Remedies Before the Commission

As stated above, when Judge Holtzoff granted the Preliminary Injunction in this case, NASA and the Civil Service Commission quickly reached an agreement that 598 of the 764 proposed reductions in-force here involved were tainted by unlawful and "*improper service contract operations*", and thus should be cancelled (J.A. 188). That agreement, however, arbitrarily and capriciously discriminated against the balance of the 764 civil service employees involved and proposed that they should still be removed from their positions (J.A. 189).

Simultaneously, the record before the Court showed that the Chairman of the Civil Service Commission had specifically advised the appellants in writing that the Commission had no jurisdiction unilaterally to stop any of the proposed removals on the ground that same were tainted by unlawful contract operations (J.A. 25). It was the Commission's position that "NASA is solely responsible" for those operations (J.A. 25). And now, of course, the Commission's Atlanta Region has confirmed and adopted that position by denying administrative appeals in these cases on the ground that "The issue of whether or not any contract between NASA and a private firm is improper or has resulted in the procurement of personal services in violation of the Federal personnel laws is a matter that is irrelevant to, and not for decision in, a reduction-in-force appeal" (See Appendix to this brief).

Under these circumstances, we submit it was erroneous for the District Court to vacate the Preliminary Injunction and to dismiss the complaint as it applied to the 166 removal and demotion actions not covered by the CSA-NASA agreement on the ground that the Court had no jurisdiction to entertain this action until after the individual appellants and the other removed employees exhausted their fruitless administrative remedies before the Commission (J.A. 216).

This Court, of course, has made it perfectly clear that the District Court has jurisdiction to entertain suits by federal civil service employees to determine whether their removal from positions as part of an agency reduction-in-force is in violation of federal law or regulations (*Reynolds v. Lovett*, CCA D.C. 1951, 201 F. 2d 181, cert. denied, 345 U.S. 926; *Roth v. Brownell*, CCA. D. C., 1954, 215 F. 2d 500, cert. denied, 75 S. Ct. 89) And, in cases where unusual circumstances of illegality indicate that a reduction-in-force should be enjoined in order to preserve the *status quo* until available administrative remedies are exhausted, the federal courts have not hesitated to grant such temporary injunctive relief (*Group v. Finletter*, D.C.D.C., 1952, 108 F. Supp. 327; *Wettre v. Hague*, CCA 1, 1948, 168 F. 2d 825; *Reeber v. Russell*, D.C. N.Y. 1950, 91 F. Supp. 108; *Farrell v. Moumau*, D.C. N.D. Cal., 1949, 85 F. Supp. 125)¹⁹.

In the case at bar, however, the record shows that the individual appellants and the other employees who have now been removed from their positions really never had any meaningful or effective administrative remedy to exhaust in the first place. In cases such as this, the courts in the federal system, with the Supreme Court in the lead,

¹⁹ And, of course, Judge Holtzoff originally correctly ruled in this action that because of "the very unusual situation" of alleged illegality presented, the entire reduction-in-force should be enjoined until administrative remedies are exhausted by the employees". (J.A. 152, 153).

have held that *when there is nothing to be gained from the exhaustion of administrative remedies and the harm from the continued existence of the proposed agency action is great, the District Court should exercise immediate jurisdiction and should not compel the parties to pursue meaningless administrative relief* (*Wolff v. Selective Service Board*, CCA, 2, 1967, 372 F. 2d. 817,825; *McCalloch v. Sociedad Nacional*, 372 U.S. 10, 16; *Leedom v. Kyne*, 358 U.S. 184; *Lichter v. United States*, 334 U.S. 742; *Glover v. United States*, CC 88, 1961, 286 F. 2d. 84; *Bullard Co. v. N.L.R.B.*, D.C.D.C. 1966, 253 F Supp. 391).

The usual and exceptional circumstances here involved, when the defendants admitted that 598 of the 764 proposed personnel actions were unlawful, clearly required the District Court, in justice, to retain jurisdiction in this case and to continue the preliminary injunction in effect until it could be fairly determined whether the remaining personnel actions were equally illegal.

POINT IV

The District Court Erroneously Granted the Intervention of National Council of Technical Service Industries

The National Council of Technical Service Industries (NCTSI) is not a party to any personnel contract with NASA. It has no legally cognizable property interest or right which will be injured if the declaratory and injunctive relief sought by this action is granted. There is no statute of the United States which confers any right to intervene on NCTSI. No relief is sought in this action against NCTSI or any of its members. NCTSI has no defense in common with either NASA or the Civil Service Commission in this case. Any interest its members have in this litigation should be asserted by them, not by their lobbyist-trade association. Thus, NCTSI has no standing to intervene herein under Rule 24 of the Federal Rules of Civil Pro-

cedure, and the District Court erred by granting the motion to intervene.²⁰

The law is settled that unless a statute gives a trade association standing to sue on behalf of its members or unless it can be shown that the trade association itself has some legally cognizable right or interest to protect in a litigation, the association lacks standing to sue (*Northern California Monument Dealers Assn. v. Interment Association of California*, D.C. Cal. 1954, 120 F. Supp. 93, 94; *Farmers Co-op Oil Co. v. Socony-Vacuum Oil Co.*, CCA 8, 1942, 133 F. 2d 101; *Alabama Independent Service Station Assn. v. Shell Petroleum Corp.* D.C. Ala., 1939, 28 F. Supp. 386). In the *Alabama Independent Service Station Assn.* case, *supra*, the court stated, at page 390:

"The capacity of the association corporation . . . to sue generally is not questioned, but its capacity to enforce the separate property rights of its individual members seems unfounded in any authority or law."

CONCLUSION

The judgment of the District Court should be reversed, the intervention of National Council of Technical Service Industries denied, and the case remanded to the District Court for further proceedings on the merits.

EDWARD L. MERRIGAN,
Attorney for Appellants,
1700 Pennsylvania Avenue N.W.
Washington, D. C.

²⁰ Judge Holtzoff granted the intervention over the objection of both appellants and appellees (J.A. 163-168). He ruled (J.A. 167): "I should think you would welcome someone who wants to be heard . . . I don't see how either the plaintiff or the defendant is going to be prejudiced . . ."

APPENDIX

UNITED STATES CIVIL SERVICE COMMISSION

ATLANTA REGION

Comprising Alabama, Florida, Georgia, Mississippi,
North Carolina, South Carolina, Tennessee, Puerto
Rico, and the Virgin Islands

OFFICE OF THE DIRECTOR, ATLANTA, GA. 30303

Address:

Director
Atlanta Region
U.S. Civil Service Commission
Merchandise Mart
240 Peachtree Street, N.W.
Atlanta, Ga. 30303

In Reply Please Refer To

Appl:sm
Your Reference
July 18, 1968

President, Lodge 1858
American Federation of Government Employees
Building 3648
Redstone Arsenal, Alabama 35809

Dear Sir:

We have decided the reduction-in-force appeal of Mrs.
Doris E. Roden.

We have reviewed the procedures used in conducting the
reduction-in-force and have examined the retention reg-
isters and other pertinent records. The records show that
the appellant was listed correctly on the retention register,
was properly reached for reduction-in-force action, and
received proper notice. The following paragraphs are in
support of these findings and recognize the substantive
bases for appeal.

The appellant has submitted that the reduction-in-force
action in her case resulted from or was affected by con-
tracting-out practices of the employing agency which she

alleges are improper. The issue of whether or not any contract between NASA and a private firm is improper or has resulted in the procurement of personal services in violation of the Federal personnel laws is a matter that is irrelevant to, and not for decision in, a reduction-in-force appeal. The reason for this is the fact that regardless of the validity of any contract entered into by NASA, the reduction-in-force rights of Government employees at NASA cannot be affected, for even if such a contract is improper the employees of the private contractor could not be "competing employees" under the law and the Civil Service regulations (5 U.S.C. 3502; 5CFR 351.203 (a)). No employee of the Government could displace or "bump" an employee of a private firm as no law or regulation exists that would require or allow such a result. Nevertheless, to be of assistance in this area, we have placed this appellant's views of support-contract inequities before NASA for its administrative consideration.

The notice period did exceed the regulatory maximum as claimed; however, on the fact that court action enjoined the agency to maintain the *status quo* prevailing on January 12, 1968, for 59 days of the 114 day notice period, no fatal defect is found in the notice.

Competitive levels must be comprised of positions in the competitive area to which employees are officially assigned. Interchange of incumbents without the work being unduly interrupted is essential. Careful examination of official position descriptions reveals in our judgment, on the specializations involved, that the appellant's competitive level was not excessively restricted.

The Agency's offer of assignment complies with the provisions of the reduction-in-force regulations in that it required the least reduction from a wage, salary, or grade standpoint. We reached this conclusion by reviewing other competitive levels about which claims were made as to assignment rights, by reviewing other levels in general,

and by considering applicable representative rates of pay. We did not find any other positions to which the appellant was entitled.

With regard to the position of Office Services Supervisor GS-342-7 and Administrative Specialist GS-301-7 we find that appellant does not possess the specialized experience required by Civil Service Handbook X-118.

Since our review of the facts disclosed no violation of the appellant's rights under the reduction-in-force regulation, the appeal is denied.

Unless this decision is further appealed within fifteen days of the day it is received, it becomes the final decision of the Civil Service Commission. Two copies of any further appeal should be addressed to the Board of Appeals and Review, U.S. Civil Service Commission, Washington, D. C. 20415. Since a further appeal does not include the right to a hearing before the Board of Appeals and Review, any representations which the Board should consider beyond those now in the appeal file must be submitted in writing. Please send two copies.

Please notify this office of the filing of any further appeal so that the appeal file can be sent promptly to the Board.

Sincerely yours,

HAMMOND B. SMITH
Hammond B. Smith
Regional Director

cc:

Appellant

George C. Marshall Space Flight Center

UNITED STATES CIVIL SERVICE COMMISSION

ATLANTA REGION

Comprising Alabama, Florida, Georgia, Mississippi,
North Carolina, South Carolina, Tennessee, Puerto
Rico, and the Virgin Islands

OFFICE OF THE DIRECTOR, ATLANTA, GA. 30303

Address:

Director
Atlanta Region
U.S. Civil Service Commission
Merchandise Mart
240 Peachtree Street, N.W.
Atlanta, Ga. 30303

In Reply Please Refer To

Appl:dtb
Your Reference
July 18, 1968

Mr. Everette Brouillette
President, Lodge 1858
American Federation of Government Employees
Building 3648
Redstone Arsenal, Alabama 35809

Dear Mr. Brouillette:

We have decided your reduction-in-force appeal.

We have reviewed the procedures used in conducting the reduction-in-force and have examined the retention registers and other pertinent records. The records show that you were listed correctly on the retention register, were properly reached for reduction-in-force action, and received proper notice. The following paragraphs are in support of these findings and recognize the substantive bases for appeal.

You have submitted that the reduction-in-force action in your case resulted from or was affected by contracting-out practices of the employing agency which you allege are improper. The issue of whether or not any contract between NASA and a private firm is improper or has resulted

in the procurement of personal services in violation of the Federal personnel laws is a matter that is irrelevant to, and not for decision in, a reduction-in-force appeal. The reason for this is the fact that regardless of the validity of any contract entered into by NASA, the reduction-in-force rights of Government employees at NASA cannot be affected, for even if such a contract is improper the employees of the private contractor could not be "competing employees" under the law and the Civil Service regulations (5 U.S.C. 3502; 5CFR 351.203 (a)). No employee of the Government could displace or "bump" an employee of a private firm as no law or regulation exists that would require or allow such a result. Nevertheless, to be of assistance in this area, we have placed your views of support-contract inequities before NASA for its administrative consideration.

The notice period did exceed the regulatory maximum as claimed; however, on the fact that court action enjoined the agency to maintain the *status quo* prevailing on January 12, 1968, for 59 days of the 114 day notice period, no fatal defect is found in the notice.

The agency's offer of assignment complies with the provisions of the reduction-in-force regulations in that it required the least reduction from a wage, salary, or grade standpoint. We reached this conclusion by reviewing other competitive levels about which claims were made as to assignment rights, by reviewing other levels in general, and by considering applicable representative rates of pay. We did not find any other position to which you were entitled. Your claims regarding your competitive level have all been considered. However, we found no changes that should be made that would be material to the action taken in your case. As a matter of information, we point out that even if all of the GS-12 Industrial Specialist positions were grouped into one competitive level you still would have been reached for reduction-in-force action.

Since our review of the facts disclosed no violation of your rights under the reduction-in-force regulations, your appeal is denied.

Unless this decision is further appealed within fifteen days of the day it is received, it becomes the final decision of the Civil Service Commission. Two copies of any further appeal should be addressed to the Board of Appeals and Review, U. S. Civil Service Commission, Washington, D. C. 20415. Since a further appeal does not include the right to a hearing before the Board of Appeals and Review, any representations which the Board should consider beyond those now in the appeal file must be submitted in writing. Please send two copies.

Please notify this office of the filing of any further appeal so that the appeal file can be sent promptly to the Board.

Sincerely yours,

HAMMOND B. SMITH
Hammond B. Smith
Regional Director

cc:

George C. Marshall Space Flight Center

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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,006

LODGE 1858, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, ET AL., *Appellants*

JAMES H. WEBB, ADMINISTRATOR, ET AL., *Appellees*
and

NATIONAL COUNCIL OF TECHNICAL
SERVICE INDUSTRIES, *Intervenor-Appellee*

BRIEF OF INTERVENOR-APPELLEE

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 14 1968

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Dated: November 4, 1968



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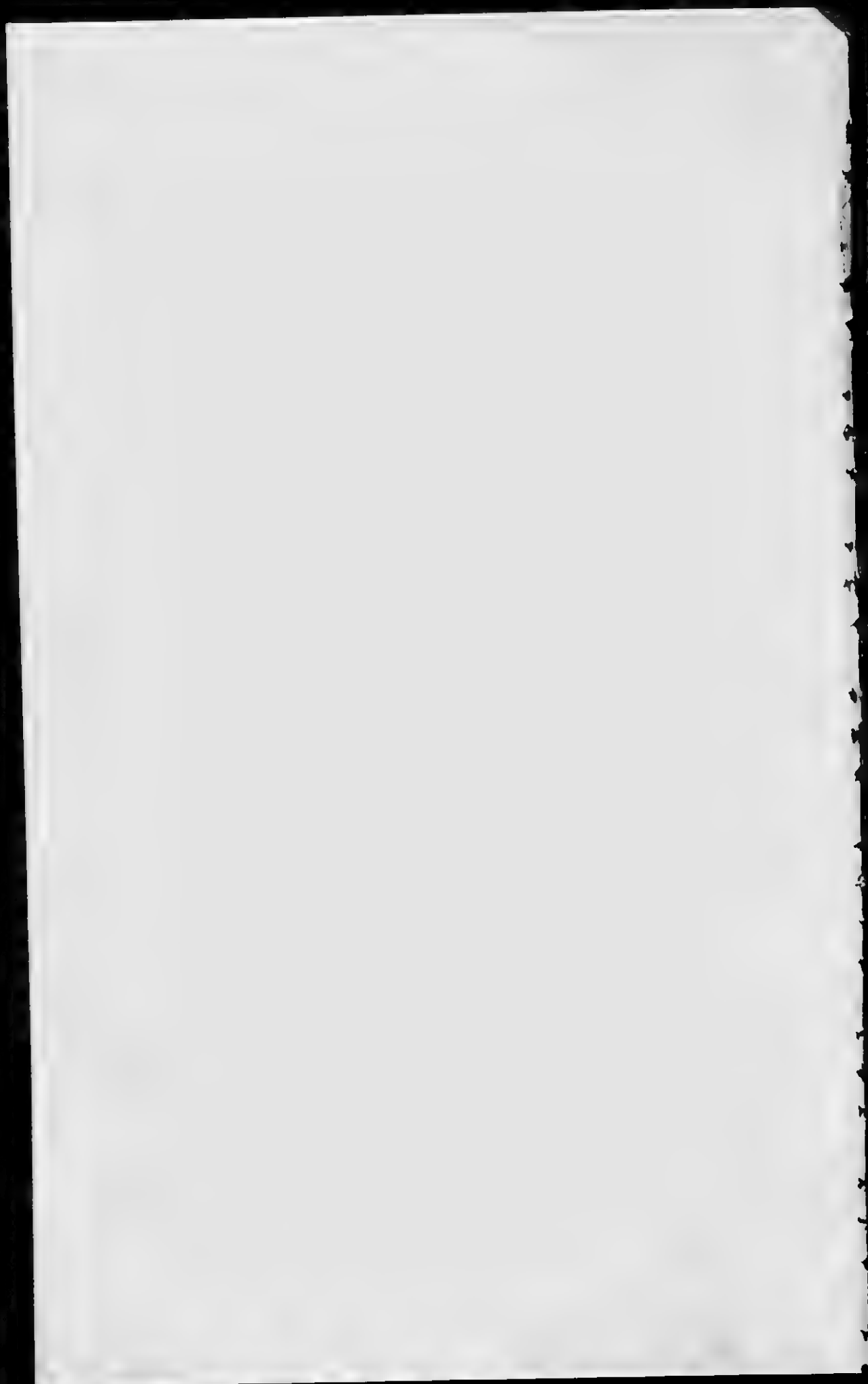
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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,006

LODGE 1858, AMERICAN FEDERATION
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v.

JAMES E. WEBB, ADMINISTRATOR, ET AL., *Appellees*

and

NATIONAL COUNCIL OF TECHNICAL
SERVICE INDUSTRIES, *Intervenor-Appellee*

BRIEF OF INTERVENOR-APPELLEE

I. STATEMENT OF THE CASE

A. INTRODUCTION

This Brief is filed by the National Council of Technical Service Industries (herein "NCTSI"), which intervened below as a defendant in this action under the provisions of Rule 24, F.R.C.P. NCTSI is an association composed of member companies which provide, by contract, a substantial amount of the more than \$8 billion of support services—involving more than 250,000 contractor employees—which various Government agencies secure from the private sector each year. (J.A. 81-82, 88)

This action constitutes a major, but unfounded, attack by unions representing federal employees upon the contracting arrangements pursuant to which, for many decades, the Government has secured vital defense, technical and other support services from private industry.

At the present time, the Government secures support services (i) from private companies pursuant to contract under the statutory authorization of the procurement laws and (ii) from federal civil servants under the federal personnel laws. The Government's choice in a particular case is based upon factors such as comparative costs, availability, and the expected length that the support services will be required. One authority has stated that, in combination, the two sources—private and public—provide the Government with about \$20 billion of support services each year:

"It has been estimated that the United States is spending at the rate of \$20 billion annually for all types of support services. For the purposes of this report, support services can be defined as any operation ancillary to the function of an agency, which does not involve a product, and can be performed by civil service employees of the agency or by contract. The total for all contract services is estimated as approximately \$8.5 billion, with \$11.5 billion being the approximate cost of in-house performance."¹

Officials of the National Aeronautics and Space Administration (herein "NASA") have described the "broad range" of support services that are provided to the Government under contract by the private sector:

"These functions vary from such services as rigging and hauling, drafting, grounds-keeping, . . . maintenance of aircraft, to functions such as those that are involved in operating special test facilities that simulate the space environment, those that support

¹ H. Rep. No. 1850, "Criteria For Support Service Cost Comparisons," House Government Operations Committee, 90th Cong., 2d Sess. (1968), p. 5 (herein referred to as "1968 House Report").

the assembly and checkout and launch of space rockets and spacecraft such as the Saturn-Apollo system, maintenance and operations of electronic equipment and systems to track our spacecraft, the reduction—collection and calculation—of the data obtained from these space flights.

“Some of these services require little contractor capital investment; others require substantial investment. Some of them require little skilled labor; others require special training and highly specialized skills. In some cases the function is separate and distinct; in others it is intimately related to the whole process of successful system development and flight mission operations. In some cases it is a service to a Government organization; in others it is in direct support of a development contractor’s responsibility. Some of these functions are performed at a Government installation; others are performed at a contractor’s plant; some are performed outside of the United States. In some cases there are many customers for the services; in others the Government may be the only customer. In some cases the operation is a continuing and stable one; in others it is so closely related to program or project requirements that it requires continuing adjustment in numbers and skills of people assigned.”²

The Bureau of the Budget has also described the “infinite variety” of services that fall within the ambit of “support services”:

“There is virtually an infinite variety of services the different agencies require in carrying out their assigned missions. They range all the way from mundane activities such as guard and window washing services on through to an activity as unique and complex as that of moving a 6-million pound Saturn rocket, 360 feet high, in an upright position, from an assembly building to a launching pad 3 miles away, by means of

² Hearings on “A Cost Profile For Support Services” Before a Subcommittee of the House Committee On Government Operations, 90th Cong., 2d Sess. (1968), p. 7 (herein referred to as “1968 House Hearings”).

a giant 'crawler,' which is probably the only one of its kind in the world."³

In the particular context of this case, NASA has made it perfectly clear that it believes that the "cooperative endeavor" of private industry, the affected agency and permanent Government personnel are essential to the accomplishment of its mission responsibilities:

"In NASA's view, the performance of the space program by means of both contractors and Civil Service activities is in accord with its statutory authority. The NASA authorization and appropriation acts have recognized this cooperative endeavor to accomplish NASA's space mission.

"In general, NASA has followed a policy of having its Civil Service personnel provide the management, planning and controls necessary to assure that the various NASA programs are properly being carried out. The capability of industry has been heavily relied upon to develop and manufacture 'the hardware' needed to perform the NASA mission and to provide support services for NASA operations. In NASA's view, the cooperative utilization of the scientific and engineering resources of the United States have added strength to industry, universities, and NASA itself as well as the other interested Government agencies and has avoided unnecessary duplication and facilities and equipment, which are among the declared objectives of the Act." (J.A. 59)

It is this "cooperative endeavor" which the Civil Service unions are attempting to challenge in this suit.

Rather than resolving this policy issue before Congress, which has recently examined support service contracting

³ *Id.*, at p. 34.

in some depth,⁴ or before the appropriate Executive officials, Appellant Lodge 1858, American Federation of Government Employees (herein "the Union") has seized upon the gambit of this lawsuit, involving an entirely lawful and proper reduction-in-force of civil servants which was ordered by Congress,⁵ to challenge before the judiciary the entire system of support service contracting. The District Court properly dismissed the action at the threshold because the allegedly-aggrieved individual employees had not exhausted their administrative remedies. Indeed, these remedies are being pursued today.

In an attempt to meet the unassailable grounds of the District Court's decision, Appellants now base their entire case upon an asserted breach of the Union's bargaining agreement with the Government. This theory inherently assumes that the Union's bargaining agreement with NASA provides a proper basis for a judicial declaration that the contracts of NCTSI's members with NASA are illegal. This point is, as demonstrated *infra*, completely without substance.

There is, of course, the preliminary question raised in this appeal whether the collective bargaining agreement itself is enforceable in these circumstances in a suit by the Union against the Government. The Union focused its main attention upon this point in Appellants' Brief. Appellants have asked this Court to "exercise judicial inventiveness" so as to hold, for the first time, that Government bargaining agreements are enforceable in court and to "fashion a body of federal law" pursuant to which the

⁴ See 1968 House Report; 1968 House Hearings; Hearings on "Support Service Contracts" before a Subcommittee of the House Committee on Government Operations, 90th Cong., 1st Sess. (1967); Status Report of Staff, "Government Policy and Practice With Respect to Contracts for Technical Services," Senate Government Operations Committee, 90th Cong., 2d Sess. (1968); Hearings on "Government Policy and Practice With Respect to Contracts for Technical Services," Before the Senate Committee on Government Operations, 90th Cong., 1st Sess. (1967).

⁵ It should be noted that contractor employees were likewise cut back because of the Congressional economy decision. (J.A., 62, 129)

Government will be required to comply with these agreements. The Government Appellees, of course, strenuously oppose this position. See Brief for Appellees, pp. 9-12. NCTSI will offer no further argument on this point. The Court should, of course, affirm the District Court's judgment upon this ground. However, should the Court proceed to a further examination of the merits of the controversy, then NCTSI asserts, in summary, that the District Court's judgment should be affirmed for the following reasons:

1. The District Court properly held that the well-established doctrine of failure to exhaust administrative remedies bars this suit. Any differences between NASA and the Civil Service Commission (herein "the Commission") which might have prompted the District Court to issue a preliminary injunction, were fully resolved. Any aggrieved employees can now pursue, and indeed are pursuing, available administrative appeals with no conceivable prejudice.

2. In addition to the exhaustion of remedies point, the Complaint should have been dismissed because, as a matter of law, Appellants have no standing to challenge in this proceeding, or in any administrative proceeding before the Commission, the legality of contracts between the Government and private industry, including NASA's contracts with NCTSI members. These contracts have no effect on Appellants, nor do Appellants have any legally-protected interest in the contracts upon which they could base proper standing to challenge their legality. Appellants' contention that their statutory rights to preferential treatment in layoffs extend beyond the classified Civil Service so as to give them a preference over employees of private contractors, working under support service contracts, is clearly in error. The relevant statute, the implementing regulations, and controlling cases all demonstrate that any retention rights of civil servants under the applicable statutory provisions, 5 U.S.C. § 3502, create preferences only over other *Government* employees. The District Court rejected Appellants' contention as being "far-fetched." Both the Chairman and the Regional Director of the Commission have

squarely rejected the Appellants' construction of the Civil Service laws.

3. If the Court should reach the issue of legality of these contracts, it is clear that, as a matter of law, NASA has comprehensive statutory authority to enter into support service contracts. The federal personnel laws do not, expressly or impliedly, supersede, limit, or repeal the procurement statutes granting broad contracting authority to NASA. These procurement statutes fully authorize NASA to enter into the support service contracts at issue here. No statute grants the Commission the authority to overrule NASA's decision that its contracts at issue here are legal and within NASA's statutory authority. Any differing views on the scope and effect of the procurement and personnel laws are matters to be resolved on grounds of *policy*, not upon the basis of statutory power.

B. FACTS RELATING TO NCTSI WHICH SUPPORT ITS INTERVENTION HEREIN

Each member of NCTSI is involved to a substantial degree in providing technical and other support services to Government agencies, including NASA, by contract. Some NCTSI member companies have been contracting to provide support services to various Government agencies for as long as twenty-five years. (J.A. 82)

Appellants' Complaint charged that certain NASA support service contracts to be performed at the Marshall Space Laboratories in Huntsville, Alabama are "arbitrary" and "illegal and that such contracts violate Federal personnel laws." In the Complaint (J.A. 11-13, 21), Appellants expressly challenged the legality of the NASA contracts of the following NCTSI members:

Northrop Corporation
Federal Electric Corporation
RCA Service Company
Computer Science, Inc.

In addition, a number of other private corporations are charged with having entered into illegal and arbitrary support service contracts with NASA. (J.A. 11-12)

In its requested relief, Appellants asked that the District Court declare that Federal personnel statutes and the regulations of the Civil Service Commission prohibit NASA:

"... from continuing to make, extend, and perform contracts at the Marshall Space Flight Center with private firms or corporations pursuant to which such firms or corporations undertake and agree, for substantial fees, profits and charges, to furnish and do furnish non-civil service employees to perform 'on site' at the Center regular work and functions of the Government (NASA); side-by-side and in competition with civil service employees of the United States who are obligated to perform and do perform substantially the same or similar work and functions of the Government, both classes of employees performing their duties in offices, laboratories and other space or vehicles provided by the Government at its own expense; with tools, equipment and supplies furnished by the Government; and pursuant to directions and common supervision supplied by the Government and civil service supervisors" (J.A. 28)⁶

Furthermore, Appellants requested preliminary and permanent injunctive relief requiring that NASA be prohibited from removing any Federal Civil Service employee pursuant to a reduction-in-force, no matter what the need

⁶ It should be noted that the responsible NASA officials have denied that there were any contractor employees working side-by-side and in competition with Civil Service employees:

"At present, NASA is aware of no instances at Marshall Space Flight Center where civil service employees are working side-by-side with contractor personnel performing the same duties" (J.A. 63)

Furthermore, no contractor employees are performing the same work or function as Civil Service employees. NASA officials,

"... have determined that support service contractor employees are not performing the same function as the civil service personnel to be separated. While, in some instances, the duties being performed by the contractor personnel may be similar to those performed by civil service personnel in other Center activities, it is not practical or feasible to insert civil service personnel in the midst of a contractor operation as these contractors have a clearly defined responsibility to perform under the terms of their contracts." (J.A. 63)

or justification, while NASA continued to contract with private industry through the medium of support service contracts. (J.A. 29-30) Appellants further requested that the Appellee Commission take such steps to enforce and administer the Federal personnel statutes so as,

“... to prohibit defendant Webb and the agency he administers from continuing to make and perform personnel contracts with private corporations pursuant to which said corporations, for large fees and profits, do no more than furnish noncivil service employees to NASA's Marshall Space Flight Center to perform functions of the Government which, as a matter of law, must and should be performed by civil service employees who are readily available for employment through the regular channels of the Civil Service System of the United States; and from utilizing such contracts as a means of obtaining non-civil service job replacements for civil service employees unlawfully removed from their positions with the United States” (J.A. 30)

Promptly after the Complaint was filed, NCTSI moved to intervene upon the following grounds:

“The requested declaration and injunctive relief would, obviously, have the most serious and crippling effect upon the contracts of NCTSI member companies. Plaintiffs have requested that the support service contracts of NCTSI member companies be declared unlawful and illegal and, by order of this Court, terminated and cancelled. With such questions and prayers raised by plaintiffs' pleadings, it is clear that (i) NCTSI, in its representative capacity, has a valid interest in the transactions that are the subject of this action—i.e., NASA's support service contracts at Marshall Space Center—and (ii) NCTSI, in its representative capacity, is so situated that the disposition of plaintiffs' Complaint and Motion may, as a practical matter, impair and impede NCTSI's ability, and that of its member companies, to protect their interests in their support service contracts with NASA.” (J.A. 85)

After hearing oral argument, the District Court granted intervention. (J.A. 167-68)

**C. FACTS RELATING TO APPELLANTS' ASSERTIONS OF
ILLEGALITY OF SUPPORT SERVICE CONTRACTS**

Appellants' Brief repeatedly refers to "illegal personnel contracting practices,"⁷ "illegal employment of thousands of 'contractor employees' still employed throughout the offices and facilities" at the Marshall Space Center,⁸ "ugly contract illegalities,"⁹ and "illegal contracting-out practices."¹⁰ Indeed, Appellants refer at one point to "positions held at the Center by contractor employees . . . pursuant to contracts found to be unlawful by the Civil Service Commission."¹¹

These erroneous assertions and mis-characterizations must be corrected.

First, the Civil Service Commission has never reviewed any of the NASA contracts challenged in this action. As the General Counsel of the Civil Service Commission stated:

"We have no information as to whether the contracts under which the contractor personnel are furnished at Marshall Space Flight Center contain these elements [which the Commission considers in examining support service contracts]." (J.A. 49)

Second, the District Court did not find that any of the contracts were illegal. Although the District Court granted a preliminary injunction at the outset of the case to preserve the status quo, it was clear that that injunction was prompted only because of the circumstances that were initially presented. The District Court explained its action in the following terms:

"The fact that this Court at one time granted a preliminary injunction, which has since been vacated,

⁷ Appellants' Brief, p. 8.

⁸ *Id.*, p. 16.

⁹ *Id.*, p. 26.

¹⁰ *Id.*, p. 32.

¹¹ *Id.*, p. 20.

does not affect the conclusion which the Court reaches. This Court, as it has stated more than once in the course of this litigation, would not have granted a preliminary injunction were it not for the following unusual situation: it appeared that the Civil Service Commission was questioning and investigating the action of the defendant agency in this case in connection with its personnel policies and interposed certain objections. The Court granted a preliminary injunction in aid of the position of the Civil Service Commission, which is charged by law and by the President with the duty of enforcing personnel policies. It was for that reason, and that reason alone, that the preliminary injunction was granted.

"It is apparent that the Civil Service Commission has completed its investigation and that the employing agency has apparently yielded to certain views of the Civil Service Commission by withdrawing a majority of the notices involved in this case.

"I refer to this fact in order that the granting of the preliminary injunction should not be regarded by anyone as an expression of this Court that the complaint stated a cause of action. The purpose of the preliminary injunction was merely to maintain the status quo in view of this extraordinary situation in which one Government agency was objecting to the actions of another, the former being charged with the personnel policies involved." (J.A. 217-218)

In granting the preliminary injunction, the District Court did *not* conclude that any of the support service contracts were illegal. As the Court stated:

"And I intimate no views, because in fact I have none, as to the legality of the arrangement." (J.A. 164)

Third, the Agreement between NASA and the Commission (J.A. 188) did not concede, affirm, or in any way relate to the legality of the support service contracts challenged in this suit. This Agreement was based upon discussions, *as a matter of policy*, between the Government de-

fendants, which resulted in a unified position as to those civil servants subject to the order for reduction-in-force. Indeed, a substantial number of those employees whose reductions were cancelled had already left their jobs voluntarily, and this cancellation had no effect on them. An additional group of these employees subject to the reduction-in-force were, in effect, rehired because the attrition rates at the NASA centers were higher than normal, and those employees were needed to fill vacancies. Thus, only a fraction of the reduction-in-force which were cancelled had any direct bearing on this case. (J.A. 189)

Fourth, the Opinion of the former General Counsel of the Civil Service Commission (herein referred to as the "Goddard Opinion") which the Appellants quote *in toto* (J.A. 295-362) and which they refer to repeatedly, did not consider or relate to in any way the contracts at issue in this case. Moreover, that Opinion has now been supplemented and superseded by a more recent opinion, issued on July 8, 1968 by the present General Counsel of the Civil Service Commission, which states:

"It should be understood that support service contracts are not *per se* proscribed by the Federal personnel laws."¹²

Fifth, as we point out *infra*, the Civil Service Commission has no authority, in any event, to declare that support service contracts of the Federal agencies are "illegal." NASA vigorously supports the legality of the contracts at issue here and asserts these contracts are fully authorized under the NASA procurement statutes. (J.A. 59) The Civil Service Commission has no authority to overrule or supersede this conclusion of NASA as to the scope of its authority under the statutes which it administers.

¹² The supplemental opinion is reprinted in 114 Cong. Rec. E6702 (July 19, 1968). It is referred to herein as the "Mondello Opinion."

II. ARGUMENT

A. THE COMPLAINT WAS PROPERLY DISMISSED BECAUSE OF FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

The Complaint was properly dismissed because of the failure of Appellants to exhaust those administrative remedies readily available, and which are now being followed, under Civil Service procedures. This point has been comprehensively argued in Appellee's Brief (pp. 5-9). We fully support the arguments and authorities cited by Appellees and set forth here only a summary statement of the exhaustion argument.

The record demonstrates that, at the time the Complaint was dismissed, a majority of the individual employees had filed administrative appeals which were, and still are, being considered by the Commission. Indeed, Appellants set forth in their brief two decisions of the Regional Director which are integral steps in the process of administrative appeals. There is no indication that the individual Appellant employees are not continuing their appeals pursuant to Commission procedures. See 5 CFR §§ 772.306-07.

In these circumstances, it is well-established that the exhaustion doctrine bars judicial intervention to review a reduction-in-force prior to the consideration and resolution of the appropriate issues in the administrative proceeding. *Young v. Higley*, 95 U.S. App. D.C. 122, 220 F. 2d 487 (D.C. Cir. 1955). There, it was specifically held that an allegation that the "administrative action complained of is probably erroneous" does not "create an exception to the rule that administrative processes must be exhausted before judicial relief is sought."

The exhaustion doctrine has also been held to bar premature judicial proceedings in the following reduction-in-force cases: *Hills v. Eisenhart*, 256 F. 2d 609, 610-611 (9th Cir. 1958), cert. denied, 358 U.S. 832 (1958); *Burns v. McCrary*, 229 F. 2d 286, 287 (2d Cir. 1956); *Fitzpatrick v. Snyder*, 220 F. 2d 522, 524 (1st Cir. 1955), cert. denied

349 U.S. 946 (1955); *Jamison v. Bakke*, 247 F. Supp. 178, 179-180 (E.D.N.Y., 1965); *Finch v. Rogers*, 181 F. Supp. 490 (D.D.C., 1960).

There are no compelling factors whatsoever here to support continuance of this case in the District Court with administrative appeals fully available and only partially exhausted. On this ground, the Complaint was properly dismissed.

B. APPELLANTS HAVE NO STANDING TO CHALLENGE THE LEGALITY OF NASA SUPPORT SERVICE CONTRACTS WITH NCTSI MEMBERS

Beyond the dispositive issue of the failure to exhaust administrative remedies, Appellants possess no rights, either by statute or from their bargaining agreement, which would permit them to litigate the legality of NASA's support service contracts with NCTSI members.

1. Neither the NASA Contracts Nor the Goddard Opinion Provides a Basis for Appellants To Challenge the Legality of NCTSI Contracts With NASA

The essence of Appellants' case is a challenge to the legality of certain support service contracts between NASA and a number of private contractors. Appellant Union is, of course, not a party to those contracts. Likewise, the individual civil servant Appellants are not obligated or regulated in any way by these contracts. Nevertheless, Appellants' Complaint asked the District Court to declare such contracts to be illegal and to order the Commission "to take such steps as may be necessary" to prevent NASA from continuing such contracts in effect.

It should be emphasized at the outset that NASA and NCTSI have asserted that the contracts in question are legal and fully authorized by the controlling procurement statutes. See Point 3, *infra*. Indeed, the Commission itself has not charged or found that *any* of these contracts are illegal, but rather has entered into a formal Agreement with NASA which formed the basis of the dissolution of the

Preliminary Injunction in the District Court. Thus, there have not been any *charges* that the contracts in question are illegal, let alone any *findings* to that effect.

Further, the Commission's Opinion states on its face that it is an intragovernmental statement. In the Commission's view, the Opinion creates no private rights. This is demonstrated by the following statement from the Opinion:

"Any determination concerning the contracts under review that we may make is strictly for the purposes of administering the personnel laws within the Executive Branch, for the guidance of NASA and other agencies, and in response to the request from the Comptroller General. We are not attempting to determine the employment status of any given individual or group of individuals under the contracts. Nor do we purport in any way to affect or resolve private rights or Government liabilities under the contracts." (J.A. 302)

In the circumstances presented here, it is apparent that the Union and Civil Service employees have no legally-protected interests in the NASA contracts with NCTSI members which would support their standing to sue the NASA defendants to litigate the legality of these contracts.

2. Appellants Have No Rights To Challenge the Legality of the NASA Contracts Under the General Principles of Standing

It is abundantly clear that governmental action which creates competition for the Union is not in itself sufficient to confer standing to challenge such action. Appellants must allege and prove the invasion of a legally-protected right to be free of competition. *Texas State AFL-CIO v. Kennedy*, 117 U.S. App. D.C. 343, 330 F. 2d 217, 218 (D.C. Cir. 1964), *cert. denied*, 379 U.S. 826; *Benson v. Schofield*, 98 U.S. App. D.C. 424, 236 F. 2d 719 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 976. They have not alleged or demonstrated such a right and, as will be shown, no such right exists.

Any consideration of Appellants' standing to sue under these general principles begins with the premise that, in order to establish such standing, they must demonstrate that the action of the Government Appellees complained of amounts to an invasion of their legally-protected rights. See *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118, 137 (1939); *Alabama Power Co. v. Ickes*, 302 U.S. 464, 479 (1938); *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940).

In *Pennsylvania Railroad Co. v. Dillon*, 118 U.S. App. D.C. 257, 335 F.2d 292 (D.C. Cir. 1964), *cert. denied sub. nom. American Hawaiian Steamship Co. v. Dillon*, 379 U.S. 945 (1964), this Court said, 335 F. 2d at 294:

"Allegation of a legally protected right is a constitutional predicate of standing to attack governmental action."

Clearly, Appellants have no legally-protected rights to be free from competition arising from NASA's contracts with private parties.

3. Appellants Cannot Base Their Standing Upon the Union's Collective Bargaining Agreement and 5 U.S.C. § 3502

Appellants have attempted to avoid the clear bar to their standing under the general principles set forth above by asserting that, in reduction-in-force situations, their bargaining agreement and the Civil Service laws vest statutory preference rights in the individual Civil Service employees as against *contractor* employees who allegedly are performing similar tasks. Specifically, Appellants rely upon the provision of the bargaining agreement that all reductions-in-force "will be carried out in strict compliance with applicable laws and regulations." (J.A. 239) Appellants assert that the "applicable law" creates preference rights not only as against competing Civil Service employees but also as against contractor employees. Since Civil Service preference rights allegedly extend to contractor employees, the Union argues that it necessarily has the right to challenge the legality of NCTSI members' support service contracts and to secure their cancellation and termination.

Appellants' entire contention regarding retention rights is based upon the following section of the Civil Service laws:

"A preference eligible employee whose efficiency or performance rating is 'good' or 'satisfactory' or better than 'good' or 'satisfactory' is entitled to be retained in preference to other competing employees. A preference eligible employee whose efficiency or performance rating is below 'good' or 'satisfactory' is entitled to be retained in preference to competing nonpreference employees who have equal or lower efficiency or performance ratings." 5 U.S.C. § 3502(b) (emphasis added.)

Thus, the key issue is whether the term "competing employee" in Section 3502(b) is limited to classified civil servants or whether it extends beyond civil servants to create a preference over employees of private contractors as well.

A review of the applicable authorities makes it absolutely clear that the civil servants' preference rights under Section 3502 extend *only* to other Government employees. This being the case, the Appellants' entire theory collapses, and there is no basis whatsoever for their claim that they have standing to challenge the legality of the support service contracts at issue here.

First, the Commission's regulations restrict the term "competing employees" to other Government employees. Section 351.203, 5 C.F.R., states:

"(a) 'Competing employee' means an employee in tenure group I, II, or III."

"Tenure groups" are categories which each agency is directed to establish reflecting the retention standing of its employees. The language of the regulations is limited to the employees of federal agencies. Thus, Section 351.501, 5 C.F.R., provides that "Each agency shall classify the competing employees on a retention register . . ." and there shall be "a separate retention register . . . in each

competitive level." 5 C.F.R. 351.404 These provisions follow sections which direct the agencies to establish competitive areas (single administrative authorities) and "competitive levels" (all positions in a competitive area, and in the same grade level which involve similar responsibilities, pay schedules, etc.). Thus, it is clear that the terms "competing employee" and "competitive" apply *exclusively* to employees of federal agencies.

The Commission has confirmed this construction of "competing employee" in these very circumstances. Appellants represented to the District Court that the Chairman of the Commission had notified them, by telegram, that:

"... the Commission's jurisdiction in such reduction-in-force cases is . . . limited to determining solely whether civil service employees have been lawfully reached for removal only with reference to other civil service employees in the same competitive area and level; and . . . its jurisdiction does not extend to deciding whether such removals are illegal with reference to the retention of noncivil service employees in the same competitive area and in essentially the same work as that performed by the civil service employees proposed for removal." See Plaintiffs' Brief in Support of the Motion for Preliminary Injunction, p. 5, filed below in C.A. 3261-67 (D.D.C.)

Second, the courts have limited the scope of statutory preference rights of civil servants vis-a-vis "competing employees" to other Government employees. Thus, in *Otto Brimberry v. United States*, 98 Ct. Cls. 335, 339 (1943), the Court held, as to the predecessor provisions of Section 3502, that:

"Both the statute and the rule plainly relate only to the classified civil service and, therefore, do not relate to plaintiff, who was appointed outside civil service."

Third, in the administrative appeals of the individual Appellant employees, referred to in Appellants' Brief, the

responsible Commission officials have confirmed this reading of the applicable statutes and regulations:

"The appellant has submitted that the reduction-in-force action in her case resulted from or was affected by contracting-out practices of the employing agency which she alleges are improper. The issue of whether or not any contract between NASA and a private firm is improper or has resulted in the procurement of personal services in violation of the Federal personnel laws is a matter that is irrelevant to, and not for decision in, a reduction-in-force appeal. The reason for this is the fact that regardless of the validity of any contract entered into by NASA, *the reduction-in-force rights of Government employees at NASA cannot be affected, for even if such a contract is improper the employees of the private contractor could not be 'competing employees' under the law and the Civil Service regulations* (5 U.S.C. 3502; 5 C.F.R. 351.203(a)). No employee of the Government could displace or 'bump' an employee of a private firm as no law or regulation exists that would require or allow such a result. Nevertheless, to be of assistance in this area, we have placed this appellant's views of support-contract inequities before NASA for its administrative consideration." Appellants' Brief, pp. 54-55. (Emphasis added.)

In sum, we believe that, under the general principles of standing outlined above, Appellants' Complaint was properly dismissed. Section 3502(b) provides no specific statutory basis for Appellants' standing to challenge the legality of the support service contracts in this suit. The Union's collective bargaining agreement adds nothing to the limited rights provided under Section 3502.¹³

¹³ A second section of the bargaining contract relied upon by Appellants states that NASA agrees to "minimize displacement by taking every possible prudent action to retain career employees." (J.A. 245) This clearly creates no rights in the Union to sue to challenge the legality of support service contracts, in light of NASA's finding that, in its view, "the performance of the space program by means of both contractors and Civil Service activities is in accord with its statutory authority." (J.A. 59)

**C. NASA AND OTHER GOVERNMENT AGENCIES HAVE FULL
STATUTORY AUTHORITY TO CONTRACT FOR SUPPORT
SERVICES**

Should this Court reach the issue of the legality of the support service contracts, we believe that, as a matter of law, the Complaint failed to state a valid cause of action. NASA clearly has ample authority under its procurement powers to enter into support service contracts. That statutory authority has not been limited or circumscribed by the federal personnel laws. Indeed, the current General Counsel of the Civil Service Commission has made it perfectly clear that "support service contracts are not *per se* proscribed by the Federal personnel laws." See *supra*, p. 12. Rather, the determination as to which of two *parallel* statutory schemes is to be used in the securing of support services is to be made by the agency as a matter of *policy*, on the basis of which method is more economical and feasible and more in the interest of the Government.

**1. Judicial Recognition of the Government's Power To Contract
for Support Services**

The courts have long recognized the broad, inherent powers of the Federal Government to contract, through its agencies, for goods and services. See, *e.g.*, *United States v. Tingey*, 30 U.S. 115, 127 (1831). This basic principle has been stated in the following terms:

"The United States Government has a capacity to contract which is co-extensive with its duties and powers

• • •

"Under the circumstances in this case, the Government was faced with a public duty and had the right to enter into a contract to carry out that duty. In *United States v. Maurice*, 1823, Fed. Case No. 15,747, Circuit Justice Marshall, in speaking of the power of the Government to contract, said: 'that there is a power to contract in every case where it is necessary to the execution of a public duty.'" *United States v. Salon*, 182 F.2d 110, 111-12 (7th Cir. 1950).

And, in the particular setting of the Armed Services Procurement Act, which by its terms is applicable to NASA's procurement activity,¹⁴ it has been said:

"Unless the Congress has prohibited the agency from entering some phase of the contractual process (or using some otherwise lawful method of contracting), a grant of wide and general authority to contract and procure will extend to all reasonable phases and methods." *G. L. Christian & Associates v. United States*, 320 F. 2d 345, 348 (Ct. Cl. 1963).

These statements of the applicable legal principles indicate that it is not necessary to rely upon specific statutory authorization in order to justify the Government's power to contract; the relevant question is whether some statute exists that expressly *restricts* the authority of the governmental agencies to contract in a proposed manner. Not only is there a complete absence of any *limiting* authority on agencies' powers to contract for support services, but, as noted *infra*, Congress has affirmatively granted comprehensive authority to agencies to enter into these contracts.

In *Powell v. U. S. Cartridge Co.*, 339 U.S. 497, 506-07 (1950), the Supreme Court recognized the Government's fundamental policy to utilize, to the maximum extent possible, the private sector in securing goods and services needed by the Government:

"... we find in these contracts a reflection of the fundamental policy of the Government to refrain, as much as possible, from doing its own manufacturing and to use, as much as possible (in the production of munitions), the experience in mass production and the genius for organization that had made American industry outstanding in the world. The essence of this policy called for private, rather than public, operation of war production plants

• • •

¹⁴ 10 U.S.C. 2303(a).

"It would have been simple for the Government to have ordered all of this production to be done under governmental operation as well as under governmental ownership. To do so, however, might have weakened our system of free enterprise. We relied upon that system as the foundation of the general industrial supremacy upon which ultimate victory might depend. In this light, the Government deliberately sought to insure private operation of its new munitions plants.

• • •

"The relationship of employee and employer between the worker and the contractor appears not only in the express terminology that has been quoted. It appears in the substantial obligation of the respondent-contractors to train their working forces, make job assignments, fix salaries, meet payrolls, comply with state workmen's compensation laws and Social Security requirements and 'to do all things necessary or convenient in and about the operating and closing down of the Plant,'"

This policy has also found expression in controlling standards of the Executive Department for the procurement of goods and services. These guiding principles are currently set forth in Circular A-76, promulgated by the Bureau of the Budget. The purpose of Circular A-76 is to restate:

"[t]he basic policies to be applied by executive agencies in determining whether *commercial and industrial products and services* used by the Government are to be provided by private suppliers or by the Government itself" See 1968 House Report, pp. 15-16. (Emphasis added.)

The policy of Circular A-76 is stated in the following terms:

"*Policy.*—The guidelines in this circular are in furtherance of the Government's general policy of relying on the private enterprise system to supply its needs." *Id.*, at 16.

It has been officially noted that the Bureau of the Budget recognizes that Circular A-76 applies to support service contracting:

"The Bureau of the Budget contends that A-76 is easily and clearly applicable to support services. Thus, Deputy Director Hughes testified:

As Circular A-76 is now written, its provisions apply, across the board, to all types of procurement It is the responsibility of the agencies to apply the provisions of Circular A-76 to all types of procurement, taking into consideration the facts and circumstances that prevail in each individual case, irrespective of whether the procurement may be regarded by them as falling within a service contract category, or some other category which they may establish for purposes of implementing the provisions of the circular (hearings, p. 34)." *Id.*, at 6.

Congress has implemented the principles reflected in the *Powell* decision and Circular A-76 in granting to NASA, and other concerned agencies, broad powers to contract with the private sector to supply goods and support services, as discussed next.

2. Statutory Authorization for NASA To Enter Into Support Service Contracts

(i) *Express Statutory Authority to NASA.* Congress has granted broad authority to NASA to enter into essential contracts, including contracts for support services. The statement of purpose of the National Aeronautics and Space Act of 1958, as amended (42 U.S.C. 2451), calls for cooperative efforts between NASA and the private sector in developing the space program:

"The aeronautical and space activities of the United States shall be conducted so as to contribute materially to one or more of the following objectives: . . . (8) The most effective utilization of the scientific and engineering resources of the United States, with close cooperation among all interested agencies of the United States in order to avoid unnecessary duplication of effort, facilities, and equipment."

The reference to "the scientific and engineering resources of the United States" obviously refers to the existing resources of the private sector.

In meeting these responsibilities, NASA is expressly authorized to contract as necessary to accomplish its mission. Thus, the Administrator is authorized:

"(5) . . . to enter into and perform such *contracts, leases, cooperative agreements, or other transactions, as may be necessary in the conduct of its work and on such terms as it may deem appropriate . . . with any person, firm, association, corporation, or educational institution.*" 42 U.S.C. § 2473(b)(5). (Emphasis supplied.)

This statutory authority has long been utilized by NASA to contract for support services. This practice is well known to Congress; nevertheless, there has never been a serious suggestion that NASA's statutory authority did not extend to support service contracts.

Indeed, in NASA's annual authorization legislation Congress has *confirmed and ratified* NASA's existing authority to secure support services by contract. See, *e.g.*, NASA Authorization Act, 1966, June 28, 1965, P.L. 89-53. Section 1(d) of the Authorization Act provides that:

"(2) maintenance and operation of facilities, *and support services contracts* may be entered into under the Administrative operations appropriation for periods not in excess of twelve months beginning at any time during the fiscal year."

Identical provisions authorizing support service contracts appear in the NASA Authorization Acts for 1967 and 1968. See P.L. 89-528 and P.L. 90-67. Certainly, if Congress thought these support service contracts were illegal, it would *not* have appropriated money each year to carry out such contracts.

Significantly, even less explicit statutory provisions relating to other agencies have been held to provide authori-

zation for contracts for support services. Thus, on May 16, 1957, the Acting Secretary of the Treasury wrote the Comptroller General of the United States asking whether the language of an appropriation relating to "necessary expenses for the operation and maintenance of the Coast Guard, not otherwise provided for," authorized the payment to private employment agencies for services furnished, under written agreement, in connection with recruiting civilian personnel. The Comptroller General said that in view of the comprehensive language of the statute, the Coast Guard's appropriation was available for the contemplated payments (B-131930, June 19, 1957).

Furthermore, the Armed Services Procurement Act, 10 U.S.C. Chapter 137, applies to NASA's purchases of property and "all services" for which payment is to be made from appropriated funds. It also applies to contracts of the Department of the Army, Navy and Air Force, and the Coast Guard. 10 U.S.C. § 2303(a). These provisions of the Armed Services Procurement Act and similar statutes pertaining to other government instrumentalities explicitly permit contracting for services. For example, Section 2304(a)(4) expressly authorizes "the head of an agency" to "negotiate . . . a contract" for "personal or professional services".¹⁵ These provisions constitute specific au-

¹⁵ In addition, this same Chapter has at least 17 other references to the procurement of support services:

- 10 U.S.C. 2304(a)(2) services by formal advertising
- 10 U.S.C. 2304(a)(5) services by educational institution
- 10 U.S.C. 2304(a)(6) foreign services
- 10 U.S.C. 2304(a)(10) sole source services
- 10 U.S.C. 2304(a)(11) services for research and development
- 10 U.S.C. 2304(a)(12) classified services
- 10 U.S.C. 2304(a)(15) negotiation of services when bids by formal advertising are unreasonable
- 10 U.S.C. 2304(a)(16) obtaining services to obtain or retain industrial mobilization
- 10 U.S.C. 2304(e) requires reports to Congress when services are procured under specific circumstances
- 10 U.S.C. 2304(g) concerns the solicitation, negotiation and award of

thorizations to concerned agencies to enter into contracts within the terms of their provisions. This principle has been confirmed in *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110 (1954), where the issue was whether the Armed Services Procurement Act itself constituted substantive authorization for the execution of a particular contract. The Court had little difficulty with the question, holding that:

"The Act gives broad powers to the Armed Services for obtaining as cheaply and promptly as possible 'purchases and contracts for supplies or services . . . for the use of any such agency or otherwise' . . ." 347 U.S. at 114.

The Court held there that, under that Act, the affected agency could use agents, other than their own personnel, to handle the details of the purchase of the service. Such an arrangement is clearly akin to a contract for support services. Indeed, Mr. Justice Black, dissenting, character-

	contracts for services
10 U.S.C. 2305	obtaining services by formal advertising
10 U.S.C. 2306(c)	procurement of services by a cost-reimbursable contract
10 U.S.C. 2306(d)	architectural or engineering services
10 U.S.C. 2307	advance payments may be authorized for service contracts
10 U.S.C. 2308	provides for interagency coordination in the procurement of services
10 U.S.C. 2310	provides for the making of findings and determinations by certain officials in the area of services as well as supplies
10 U.S.C. 2311	provides some authority to delegate the right to make findings and determinations

See also, 15 U.S.C. 631 which declares it to be the policy of Congress that small business concerns shall receive a fair proportion of Government contracts for property and services; 15 U.S.C. 637(b)(8), which provides that it shall be the duty of the Secretary of Commerce to publicize the requirements of all Federal agencies to procure supplies and services. Finally, see 31 U.S.C. 686, known as the Economy Act of June 30, 1932, which avoids duplication in contracting for supplies or services. If one agency has a source of services by contract, another agency can order or requisition the same services of the contracting agency.

ized the Court's Opinion in that light—"that Government purchasing agents can delegate to their subordinates authority to delegate to private persons power to buy goods for the Government and pledge its credit to pay for them." 347 U.S. at 123.

(ii) *Congressional Recognition of Support Service Contracts*. In addition to the specific statutory authority given to NASA to contract for support services, Congress has long recognized, in a variety of provisions affecting many agencies, including NASA, the legality of contracting for support services. Such procurement statutes provide ample authority for governmental agencies to secure necessary goods and services. Examples include the recent Multiyear Procurement Act, the Advertising Act, annual appropriations acts for the military and other departments, and the Service Contract Act of 1965.

(a) *The Multiyear Procurement Act*, Pub. L. 90-378. In the Second Session of the 90th Congress, the Multiyear Procurement Act was passed which extends the authorized period for certain types of support service contracts to five years. The Act provides explicit recognition of the power to contract for such services:

"The head of an agency may enter into contracts for periods of not more than five years for the following types of services (and items of supply related to such services) to be performed outside the forty-eight contiguous States and the District of Columbia for which funds would otherwise be available for obligation only within the fiscal year for which appropriated—

'(A) operations, maintenance, and support of facilities and installations;

'(B) maintenance or modification of aircraft, ships, vehicles, and other highly complex military equipment;

'(C) specialized training necessitating high quality instructor skills (for example, pilot and other aircrew members; foreign language training); and

‘(D) base services (for example, ground maintenance; in-plane refueling; bus transportation; refuse collection and disposal);

whenever he finds that:

‘(i) there will be a continuing requirement for the services consonant with current plans for the proposed contract period;

‘(ii) the furnishing of such services will require a substantial initial investment in plant or equipment, or the incurrence of substantial contingent liabilities for the assembly, training, or transportation of a specialized work force; and

‘(iii) the use of such a contract will promote the best interests of the United States by encouraging effective competition and promoting economies in operation.’ ”

The legislative history of the bill¹⁶ makes it perfectly clear that Congress fully recognized the legality of support service contracts, and, for the particular service contracts listed above, wished to extend the contract period for reasons of economy and efficiency.

(b) *The Advertising Act*, 41 U.S.C. § 4, reflects the power of the Government to secure the services of technical and professional personnel. It provides that unless a particular appropriation act otherwise dictates, contracts “for supplies or services for the Government” may be entered into only after advertising. One exception to the advertising requirement is where “services are required to be performed by the contractor in person and are (A) of a technical and professional nature or (B) under Government supervision and paid for on a time basis.” For other references to the procurement of services, see 41 U.S.C. § 51; U.S.C. § 252; 41 U.S.C. § 1651 *et seq.*

¹⁶ Sen. Rep. No. 1313, 90th Cong., 2d Sess. (1968); H. Rep. No. 1315, 90th Cong., 2d Sess. (1968).

(c) *The annual appropriations acts*, not only for NASA, *supra*, but also for the Department of Defense, contain authorizations to the various departments, to contract to procure needed support services. See, *e.g.*, the authorization provision "for expenses, not otherwise provided for, necessary for the operation and maintenance, . . . including administration" of the Department of Defense, the Army, the Navy and the Marine Corps; and the Air Force. Pub. L. No. 89-213, 89th Cong., 1st Sess., Title II.

(d) Finally, Congress has recognized contracts pursuant to which support services are properly provided the Government by contract in the *Service Contract Act of 1965*, 79 Stat. 1034. That Act is designed to guarantee certain wage standards for employees of Government contractors. The Act applies to contracts, "the principal purpose of which is to furnish services in the United States through the use of service employees."

The various provisions set forth above make it clear that NASA has full statutory authority to contract for support services. Indeed, there is no doubt or qualifications in the statements of NASA officials that NASA support service contracts are completely legal. Thus, in an affidavit filed in the District Court by a responsible NASA official, it was stated:

"... In NASA's view, the performance of the space program by means of both contractors and Civil Service activities is in accord with its statutory authority. The NASA authorization and appropriation acts have recognized this cooperative endeavor to accomplish NASA's space mission." (J.A. 59)

Furthermore, the Administrator of NASA has testified, in connection with support service contracts, that:

"... in terms of total cost and in terms of meeting the needs of the National Aeronautics and Space Administration programs, *I believe these [support service] contracts are legal, effective, and in the interest of the Government.*" NASA's Proposed Operating Plan for Fiscal Year 1968, Hearings before the Senate

Committee on Aeronautical and Space Sciences, 90th Cong., 1st Sess. (November 8, 1967). (Emphasis added).

Finally, the Administrator described NASA's policy toward support service contracts as follows:

"First of all, as this very large program progressed, we utilized the policy of the government to use contractors to the fullest extent possible provided the cost was no more than ten percent greater on the basis that the fluctuations would more than make up for any such difference of ten percent—that is, as you went up and down. . . . The question of supervision of contractor personnel became a central issue and we were working with the Civil Service Commission and the General Accounting Office to resolve all open questions at this level

"In the meantime, the *General Counsel of the Civil Service Commission* rendered what I believe to be a policy statement in the form of a legal opinion. Then the injunctions followed in an effort to make this policy statement become in fact the legally binding criteria for use by agencies like NASA. To that we strongly objected, continue to object, and have returned now to an examination of the work.

. . . .

"... But we cannot, I believe, operate under the very large amount of work to be done under these kinds of contracts in NASA with a complete veto by the Civil Service Commission of what we can contract for and what we cannot. I think we have to operate under the law, be responsible for our actions, and meet all the laws, not just those that they believe it is their responsibility to enforce." Testimony of James B. Webb, Administrator, Hearings Before the Senate Committee on Aeronautical and Space Sciences, 90th Cong., 1st Session (February 28, 1967). (Emphasis added).

Thus, there can be no question that NASA fully recognizes and defends the legality of their support service contracts, while recognizing that there might be differences and conflicts—as a matter of policy—between Civil Service and other agencies relating to the wisdom of using one method or the other—contract or civil service—in obtaining support services in individual cases.

3. The Resolution of Any Differences Between Federal Personnel Laws and Federal Procurement Laws Is a Matter of Policy

Appellants have not relied upon any provisions in the federal personnel laws which expressly or impliedly circumscribe the statutory authority of agencies such as NASA to contract for necessary support services. The Goddard Opinion, which is Appellants' sole authority, cites no statute or regulation of any sort which gives a preeminent position to the General Counsel of the Commission, permitting him to overrule the conclusions of a line agency relating to the exercise of that agency's statutory authority.¹⁷ Furthermore, that Opinion has now been superseded by the Mondello Opinion which confirms that the Civil Service Commission now acknowledges that support service contracts are not *per se* illegal under the federal personnel laws.

Of course, there have been, and will continue to be, differences in emphasis and approach in the positions of the agencies administering the personnel law and the procurement statutes. Conflicts will arise. But they are matters to be resolved on *policy* grounds, rather than upon the

¹⁷ Certain isolated statements are quoted by the General Counsel from various opinions of the Attorney General; however, these quotations have no bearing on the issue here. All the cases from which the quotations were taken involved concededly federal employees. Thus, at 25 Ops. Att'y Gen. 341 (1905), it was held that the appointment of employees authorized by statute to be hired at the United States Military Academy had to be made from those eligible under civil service requirements. And, similarly, at 26 Ops. Att'y Gen. 363 (1907) it was ruled that deputy collectors of internal revenue were officers or employees of the United States and that therefore they were appropriately included in the competitive service. At 26 Ops. Att'y Gen. 503 (1908), it was ruled that civil service hiring was required where an Act of Congress contained a provision for temporary personnel "to be selected and employed" by the Secretary of Interior. At 27 Ops. Att'y Gen. 95 (1908), it was held that clerks of the United States Attorneys (with the exception of one in each office specifically excluded from civil service rules by statute) had to be selected under civil service rules. Finally, 27 Ops. Att'y Gen. 121 (1933), involved whether employees selected by the Comptroller of the Currency, working for the Insolvent National Bank Division, were in the classified civil service. The question arose because their salaries were incidental items of receivership to be paid from assets of insolvent banks. Clearly, none of these situations involved the authority of the Government to contract.

legal grounds of an agency's statutory authority. This is the position long held by the General Accounting Office,¹⁸ that:

"The general rule is that purely personal services for the Government are required to be performed by Federal personnel under governmental supervision. . . . However, the requirement of this rule is one of policy rather than positive law and when it is administratively determined that it would be substantially more economical, feasible, or necessary by reason of unusual circumstances to have the work performed by non-government parties, and that is clearly demonstrable, we would not object to the procurement of such work through proper contractual arrangements." 42 Decs. Comp. Gen. 890 (1963).

This holding is particularly significant since it arose in a factual situation where the Comptroller General held that the proposed contractual arrangement clearly constituted a "purely personal service" contract. Although there was no specific authorizing legislation for the Internal Revenue Service to enter into such a contract, the Comptroller General concluded that no legal infirmities existed to entering into the contract. The critical question was one of policy, which the Comptroller General said could be resolved only by weighing all relevant facts. This decision is consistent with a long line of authority. Appendix A, annexed to this Brief, discusses this prior authority, including 43 Decs. Comp. Gen. 390 (1963); 36 Decs. Comp. Gen. 338 (1956); 31 Decs. Comp. Gen. 372 (1952); 36 Decs. Comp. Gen. 338 (1956); 31 Decs. Comp. Gen. 372 (1952); 17 Decs. Comp. Gen. 52 (1937); 14 Decs. Comp. Gen. 909 (1935); and 13 Decs. Comp. Gen. 351 (1934).

We believe that this general rule and the policy exceptions—utilized by the General Accounting Office over many

¹⁸ It should be noted that the Comptroller General has recently rendered some opinions inconsistent with this long line of authorities. See, e.g., 44 Decs. Comp. Gen. 761 (1965).

years—state the proper accommodation of the two independent statutory arrangements relating to personnel and to procurement. In applying that rule, the Comptroller General has authorized support service contracts on various policy grounds:

- 6 *Decs. Comp. Gen. 180 (1926)*. Contracting out with turbine experts approved on the basis that no civil service personnel were as well qualified emphasized.
- 19 *Decs. Comp. Gen. 287 (1939)*. Contracting out with artists to prepare posters approved on grounds of non-availability of qualified civil service personnel.
- 21 *Decs. Comp. Gen. 388 (1941)*. Contracting out for stenographic clerks to mail applications approved on grounds of economy.
- 17 *Decs. Comp. Gen. 87 (1937)*. Contracting out with a messenger service for use of messengers when Morse wire ordinarily used was busy, approved on grounds of economy.
- 31 *Decs. Comp. Gen. 372 (1950)*. Contracting out for a compilation of credit information was approved where it had been administratively determined that such information was essential to authorize security control and could not have been developed by available employees at relatively reasonable cost.
- 21 *Decs. Comp. Gen. 388 (1941)*. Purchase of list of motor vehicles by Commissioner of Internal Revenue authorized. Commissioner also used stenographic clerks of company which owned list of vehicle owners. These clerks folded applications and mailed them for the Commissioner. Regular clerks of the Bureau of Internal Revenue were available and qualified; however, the Commissioner demonstrated that by using the other clerks a saving of approximately two-thirds of the cost of using regular Government personnel could be achieved.
- 21 *Decs. Comp. Gen. 400 (1941)*. Contracting out for use of IBM employees was authorized where the Bureau of the Census demonstrated that use of IBM personnel would be 15 percent cheaper than use of its own machine operators.

30 *Decs. Comp. Gen.* 333 (1951). Contracting out for janitor service approved although mail clerks were available to do the job, on the grounds that mail clerks were "too expensive."

26 *Decs. Comp. Gen.* 791 (1947). Contracting out for switchboard operators in isolated areas approved. It would have been possible to install switchboards where regular Government personnel were available; however, installation of new switchboards was considered "impractical financially."

This long line of controlling precedents clearly demonstrates that the civil service laws do not themselves limit or circumscribe the legal authority of government agencies to secure products and services as necessary.¹⁹ Thus, the two statutory arrangements exist parallel to each other—each, as a matter of law, unaffected by the other. When a choice between the two is required, there must, of course, be an administrative reconciliation—but this is a matter of policy, not legal authority, as the Comptroller has stated.

In sum, there can be no doubt that, as a matter of law, support service contracts are fully authorized by the controlling statutes.

¹⁹ Russell N. Fairbanks, Assistant Dean of Fordham University School of Law and formerly Chief of the Procurement Law Division of the United States Army Judge Advocate General's School at Charlottesville, Virginia, in a comprehensive review of applicable precedents, has found that there is no legal prohibition against service contracts. In this article he discusses at some length the decisions of the Comptroller General on the point and concludes,

"[I]t makes no difference whether in fact the arrangement being examined by the Comptroller General is for 'personal services,' whatever they may be. In 24 *Comp. Gen.* 924 (1945), the Comptroller General reported that he not infrequently authorized the procurement of personal services by contract. In 1954 he authorized the procurement by contract of the services of certain coffee inspectors, a service which he said was undoubtedly personal. Thus, whether to permit an executive agency to enter into a contract for services which conceivably might be performed by persons hired under civil service regulations is truly a policy decision. . . ."

(Footnotes deleted.)

Fairbanks, *Personal Service Contracts*, 6 *MILL. REV.* 1, 20 (1959).

**D. THE DISTRICT COURT PROPERLY GRANTED NCTSI'S
MOTION TO INTERVENE.**

The District Court properly granted NCTSI's Motion to Intervene because, in the Court's words, "They do have interests to protect." (J.A. 168)

We pointed out above that Appellants' Complaint asked the District Court to declare certain of the support service contracts of NCTSI-member companies to be illegal and prayed that they be terminated and cancelled. The extraordinary economic harm which would result from such a ruling of the District Court is apparent. In the light of the Appellants' Complaint, it is quite surprising that Appellants now claim that "[n]o relief is sought in this action against NCTSI or any of its members." (Appellants' Brief, p. 52)

The Court's decision granting intervention under Rule 24 was fully justified. There can be no doubt that NCTSI is a proper party to intervene in its representative capacity for its members. The Supreme Court in *National Motor Freight Traffic Ass'n. v. United States*, 372 U. S. 246, 247 (1963), held that an association has standing in such circumstances:

"Since individual member carriers of appellants will be aggrieved by the Commission's order, and since appellants are proper representatives of the interests of their members, appellants have standing to challenge the validity of the Commission's order in the District Court. . . ."

This principle, so forcefully stated by the Supreme Court in 1963, has found application in two recent decisions which confirm the proper status of an association to litigate in a representative capacity on behalf of its members. Although the following two cases dealt with the standing of an association to sue as a plaintiff, there can be no different rule for an intervenor.

First, in *Abbott Laboratories v. Celebrezze*, 228 F. Supp. 855, 860-861 (D. Del. 1964), an industry association sued to challenge the legality of certain regulations. The regulations were not promulgated to apply to the association directly; their impact was only upon the member companies. Over the objection of the defendants, the District Court squarely held that the association had standing to sue in a representative capacity for its members:

"It is not in its own right, however, but as the representative of some 140 drug companies that this court finds PMA to have standing to sue. In *National Motor Freight Traffic Association, Inc. v. United States*, certain associations of motor carriers sought to set aside a decision of the Interstate Commerce Commission. The Government argued that the plaintiffs lacked standing to sue because they were associations of carriers rather than the carriers actually affected by the contested order. The lower court agreed with the Government's contention holding that the associations were not qualified to sue because they suffered no legally cognizable injury 'except in the remote sense that the problems of their members are their concern.' *National Motor Freight Traffic Association, Inc. v. United States*, 205 F. Supp. 592, 593 (D.C. 1962), *aff'd*, 372 U.S. 246, 83 S.Ct. 688, 9 L.Ed.2d 709 (1963).

"The Supreme Court specifically rejected this ground for decision:

"The appellants are associations of motor carriers, authorized under 49 USC § 5b, and perform significant functions in the administration of the Interstate Commerce Act, including the representation of member carriers in proceedings before the Commission. Since individual member carriers of appellants will be aggrieved by the Commission's order, and since appellants are proper representatives of the interests of their members, appellants have standing to challenge the validity of the Commission's order in the District Court.' *National Motor Freight Traffic Association, Inc. v. United States*, 372 U.S. 246, 247, 83 S.Ct. 688, 689, 9 L.Ed.2d 709 (1963).

"The defendants here make much of the Supreme Court's reference to the authorization of motor carrier associations under 49 U.S.C. § 5b. That section, however, does no more than insulate associations approved by the I.C.C. from violation of the antitrust laws. *The crux of the opinion centers on the association as a representative of members who are individually harmed.* In that sense, the PMA is similar to the associations in the Motor Freight Traffic case. It represents its members before the Food and Drug administration [sic] just as the motor carrier associations appeared in their members' behalf before the I.C.C.

"The PMA is a proper representative of the interests of its member drug companies and has standing to challenge the validity of the defendant Commissioner's regulations in this Court."²⁰ (Emphasis added.)

A second illustration of an association's standing to sue on behalf of its members came in a similar case, *Toilet Goods Association v. Celebrezze*, 235 F. Supp. 648 (S.D.N.Y. 1964). There, Judge Tyler held that the association had "standing to sue." In unqualified terms, the court held:

"The members of the Association account for more than 90% of the annual sales of cosmetics in the United States. *They are individually harmed and the Association, as a proper representative of the interests of its members, can challenge the regulations in that capacity.* National Motor Freight Traffic Association v. United States, 372 U.S. 246, 83 S.Ct. 688, 9 L.Ed.2d 709 (1963); *Abbott Laboratories v. Celebrezze*, supra."²¹ *Id.*, at 653 (emphasis added.)

²⁰ Chief Judge Wright's decision was vacated by the Court of Appeals for the Second Circuit, 352 F.2d 286; the decision of the Court of Appeals was reversed by the Supreme Court, 387 U.S. 136 (1967). The opinions of the appellate courts reflect nothing contrary to Judge Wright's decision on the standing of the association to sue.

²¹ This case was affirmed in part and reversed in part by the Court of Appeals, 360 F.2d 677 (2d Cir. 1966), and that ruling was affirmed by the Supreme Court, 387 U.S. 158, 167 (1967). However, nothing in the appellate decisions indicates any ruling contrary to that by Judge Tyler holding that the association had standing to sue in a representative capacity for its members.

The cases cited by the Appellants (Appellants' Brief, p. 53) are not in point. The three cases are all private antitrust cases where the associations were suing to enforce the individual members' statutory rights to treble damages. More significantly, the cases all arose before, and are inconsistent with, the Supreme Court's definitive decision in *National Motor Freight Traffic Ass'n v. United States*, referred to above.

III. CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX A

**Over the Course of Many Years, the Comptroller General Held
That Government Agencies Have the Legal Authority
To Contract for Personal or Support Services, Free
From Any Restrictions of the Civil Service Laws**

The power of Government agencies to secure needed personal services by contractual arrangements with the private sector is confirmed by a line of authoritative decisions by the Comptroller General which consistently ruled that the issue of contracting for personal or support services turns solely on questions of policy, not statutory authority. The Comptroller General now appears to be abandoning this well-established precedent. We believe that these more recent rulings are in error.

The decisions of the Comptroller General constitute the only comprehensive body of law on the question of the Government's authority to contract for personal or support services. These decisions have been prompted because the Comptroller General is frequently called upon to give his opinion as to the legality of proposed contracts, in view of his conclusive authority to take exception to the accounts of Government disbursing officers, pursuant to 31 U.S.C. § 74.

The Comptroller General's decisions in this area relate generally to two categories of contracts—those involving "personal services" and those involving "nonpersonal services." The Comptroller General has consistently held that the principal criterion in determining whether a contract is one for "personal services" is the degree of governmental supervision over the employee in question. In this regard, he has stated:

"Agreements with individuals for personal services as distinguished from nonpersonal services have been discussed in numerous decisions of this office, and the distinction plainly was . . . between 'Persons authorized to be and who are employed under an instrument designated as a contract and *who perform their work*

under the supervision and control of Governmental officers' and 'contractors engaged—not employed—on other than a personal service basis (generally those who do not perform their work under the supervision and control of the Government).'” 28 Decs. Comp. Gen. 50, 52-53 (1948). (Emphasis added.)

However, the past decisions of the Comptroller General make perfectly clear that a preliminary finding that a “personal service” contract is involved does *not* raise or resolve the question of statutory authority to contract. Rather, the Comptroller General recognized that the central question is whether to approve the contract as a matter of *policy*, with a view to all existing circumstances. In reviewing such service contracts, the decisions of the Comptroller General have referred to the “general rule” that “purely personal services for the government are required to be performed by Federal personnel under governmental supervision.” However, the “general rule,” as the Comptroller General has frequently said, “is one of policy rather than positive law” and may be superseded “when it is administratively determined that it would be substantially more economical, feasible, or necessary by reason of unusual circumstances to have the work performed by nongovernmental parties,” thus permitting the contract.

This rule has been applied in a long line of cases, in a variety of factual situations, to authorize the procurement of services by contract. It must be emphasized that in each of the following illustrative cases, where the contract was *approved* by the Comptroller General, the factual relationship would in all probability conform with the “criteria” established by the General Counsel of the Civil Service Commission in the Goddard Opinion which would have required a finding that the contract was illegal.

(i) At 43 Decs.Comp.Gen. 390 (1963), the Comptroller General was asked to consider an Internal Revenue Service proposal to contract for the receipt, storage and issue of federal income tax forms to points within the Los Angeles District of the Internal Revenue Service, for the period

beginning December 1, 1963, and ending April 15, 1964.²² Under the proposal the contractor would pick up orders daily at the Federal Building in Los Angeles, fill the orders and distribute them to banks, tax practitioners, Government agencies and others requiring forms in bulk quantity. The distribution of forms would be conducted from an Internal Revenue Service warehouse where the contractor would unload, receive, record and place in stacks shipments of forms. The contractor would maintain shelf stocks and furnish weekly inventories. The Government, for at least one month, and for no more than two months (the contract covered a period of less than five months), would assign supervisors to instruct the contractor's personnel in their duties. The price under the contract would be on a per-1,000-forms-distributed basis.

In approving the contract, the Comptroller General said that it was significant that the contract was for a short period of time, that after the initial period of instruction, the contractor would supervise his own employees,²³ and that payment was based upon results rather than time expended.²⁴ Nevertheless, he held that the proposal clearly constituted a "purely personal service" contract. However, although there was no specific authorizing legislation for the Internal Revenue Service to enter into such a contract, he concluded that no legal infirmities existed to entering into the contract. *The critical question was one of policy, which the Comptroller General said could be resolved only by weighing all relevant facts.* In this regard, he asserted:

"The general rule is that purely personal services for the Government are required to be performed by Fed-

²² The Comptroller General recognized that, although the contract was for a short period, a similar arrangement would probably be entered into each year.

²³ The Comptroller General obviously found a sufficient degree of governmental supervision to require discussion of the authority of the Internal Revenue Service to contract for personal services.

²⁴ The method by which payments under contracts are computed is not relevant to the analysis of the General Counsel.

eral personnel under governmental supervision. . . . However, the requirement of this rule is one of policy rather than positive law and when it is administratively determined that it would be substantially more economical, feasible, or necessary by reason of unusual circumstances to have the work performed by non-government parties, and that is clearly demonstrable, we would not object to the procurement of such work through proper contractual arrangements." 43 Decs. Comp. Gen. at 392.

(ii) At 36 Decs. Comp. Gen. 338 (1956), the Civil Aeronautics Board was authorized to contract with a consulting firm "to provide independent expert advice and testimony with respect to the question of rate of return" in connection with an investigation of domestic passenger fares. There, the Comptroller General again emphasized the policy issues in determining the propriety of the contract, even where authorized under 5 U.S.C. § 55(a), stating:

"[W]here the services required would ordinarily fall within the scope of work generally performed by officers and employees of the agency or other Government agencies, the determination to invoke such contracting authority should be based upon cogent considerations of the necessity, efficiency, and economy of the contract procurement." 36 Decs. Comp. Gen. at 338-39.

(iii) At 31 Decs. Comp. Gen. 372 (1952), the Secretary of Commerce was authorized to procure credit information for security control purposes from local credit bureaus. The Comptroller General made passing mention of the "general rule" that "purely personal services" may not be obtained on a contractual basis, but reaffirmed that "the requirement is one of policy rather than positive law." He approved the contract in question, which involved "purely personal services," finding that a policy justification was established because of the economies afforded by the con-

tract approach. No specific enabling legislation permitting the Secretary to enter into such a contract was cited.

(iv) At 17 Decs. Comp. Gen. 52 (1937), the Comptroller General indicated that services of messengers are "purely personal" and recognized the "long-established rule" that such services be performed by regular employees of the Government rather than by contracting with private individuals or concerns to furnish personnel for such services. Nevertheless, the Comptroller General authorized, on policy grounds, other contracts for similar messenger services where a field office had no regular messengers on its staff, 3 Decs. Comp. Gen. 436 (1924), and where telegraph wires were not available to carry material between governmental offices during "off hours." 17 Decs. Comp. Gen. 87 (1937).

(v) At 14 Decs. Comp. Gen. 909 (1935) and 13 Decs. Comp. Gen. 351 (1934), questions were raised as to the propriety of contracts for architectural and related services. In making his rulings, the Comptroller General indicated that the proposals involved personal services normally to be performed by regular employees. The Comptroller General did not, however, withhold his consent to the contracts. Instead, he ruled that the agencies involved should make a factual inquiry whether the services could be obtained from within the Government. If, after study, contracting was determined to be the only reasonable method by which the services could be obtained, the Comptroller General stated that he would interpose no objection to the proposals.²⁵

(vi) There are several other published cases in which the Comptroller General has recognized the "general rule" that purely personal services are not to be contracted out, but that the "rule" is a matter of policy and not law, and

²⁵ The same rationale was followed at 11 Decs. Comp. Gen. 99 (1931), where the service involved the cataloging of the Gellatly Collection of antique glass in the National Gallery of Art, although the Comptroller General found that "[c]ataloging is generally a personal service for performance by regular employees of the Government"

that contracting with private parties may be justified in appropriate situations.²⁶

(vii) Finally, even where the Comptroller General has failed to approve a proposal to contract for personal services, he has done so because of policy considerations, as exemplified by 32 Decs. Comp. Gen. 427 (1953). There, the Comptroller General had before him a proposal of the Secretary of the Army to contract with a private firm for the processing of shipping orders and purchase requisitions. It was admitted that one purpose of the proposal was to avoid congressionally-imposed personnel ceilings. The contractor would furnish all services necessary to prepare the shipping orders, as directed by a contracting officer, for a little more than one year at a stated unit price per document. The Government agreed to provide all office space, heat, utilities, operating supplies and miscellaneous equipment required for performance under the contract.²⁷ The Comptroller General failed to authorize the contract, but did so on the basis of the "general rule":

"It would appear that the Government furnishes everything necessary for the performance of the services except the employees, and it is not contended that the latter could not have been hired by the Government in the usual manner. The services are of the character usually performed by classified employees, and they are of a continuing, or at least, of indeterminate duration.

"Under the circumstances, it must be held that the procurement of the services involved by the contract

²⁶ At 33 Decs. Comp. Gen. 170 (1953), for example, the Department of Agriculture was authorized to contract for personal services regarding log scaling reports because of impracticalities and increased expenses involved in having regular personnel perform the work. At 26 Decs. Comp. Gen. 468 (1947), the Secretary of the Interior was authorized to enter into contracts for certain field engineering services; and at 25 Decs. Comp. Gen. 924 (1945) the Secretary of the Navy was permitted to obtain, by contract with a corporation, professional advice pertaining to the refloating of a vessel.

²⁷ Thus, the case involved virtually the same factual situations as the Internal Revenue Service proposal which was approved by the Comptroller General at 43 Decs. Comp. Gen. 390, *supra*.

was unauthorized, *as being in contravention of the above-mentioned general rule that purely personal services for the Government are required to be performed by Federal personnel under Government supervision.*" 32 Decs. Comp. Gen. at 430-31. (Emphasis added.)²⁸

This extended line of decisions in parallel circumstances makes it perfectly clear that there is no legal prohibition against Government contracts for personal or support services. Significantly, in these many decisions, the civil service laws were not considered to bar or prohibit such contracts; indeed, the civil service laws apparently were not considered applicable at all.²⁹

²⁸ At 32 Decs. Comp. Gen. 127 (1952), the "general rule" pertaining to contracts for personal services was advanced as precluding an arrangement for stenographic and typing services, and mention was made of cases in which the general rule has been excepted. If contracts for personal services were violative of statutes, exceptions would also have to be made pursuant to statute, for an administrator has no authority to waive a statutory provision. See also 6 Decs. Comp. Gen. 51 (1926), concerning scientific research; 6 Decs. Comp. Gen. 140 (1926), concerning tea inspection; 3 Decs. Comp. Gen. 709 (1924), concerning the development of a report. The decisional rationale of several of these cases was an Act of August 5, 1882, ch. 389, § 4, 22 Stat. 255, which prohibited employment of personal services at the seat of Government unless specifically authorized in the appropriation. If Government agencies lack authority to contract for personal services, as contended by the General Counsel, it would be a fruitless act for Congress to adopt a statute, such as this one, imposing limitations upon a nonexistent authority. The provision was repealed in its pertinent parts by the Act of September 23, 1950, ch. 1010, § 7(b), 64 Stat. 986.

²⁹ We have found only rare instances in the Comptroller General's decisions where mention is made of the civil service laws in the context of what have been termed contracts for personal services. It should be noted that on two occasions in the mid-1920's, the Comptroller General indicated that the civil service laws might have some direct effect in this area. Thus, at 6 Decs. Comp. Gen. 324 (1926), in considering a proposal to contract for draftsmen and architects, it was noted that "the services contemplated . . . [were] personal services," and the agency was instructed to attempt to find the needed services within the Government. Failing that, the Comptroller General said personnel should be hired under civil service laws. This same rationale was applied in 6 Decs. Comp. Gen. 364 (1926), in the context of translators. These two cases were based, in large measure, upon the provisions of a particular statute, now repealed. Moreover, these early decisions must be considered to be overruled by the long series of contrary opinions of the Comptroller General, cited above.

IN THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

LODGE 1858, AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, EVERETT A. BROUILLETTE, et al.,

Appellants,

v.

JAMES E. WEBB, et al.,

Appellees,

and

NATIONAL COUNCIL OF TECHNICAL SERVICE INDUSTRIES,

Intervenor-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR APPELLEES

United States Court of Appeals
for the District of Columbia Circuit

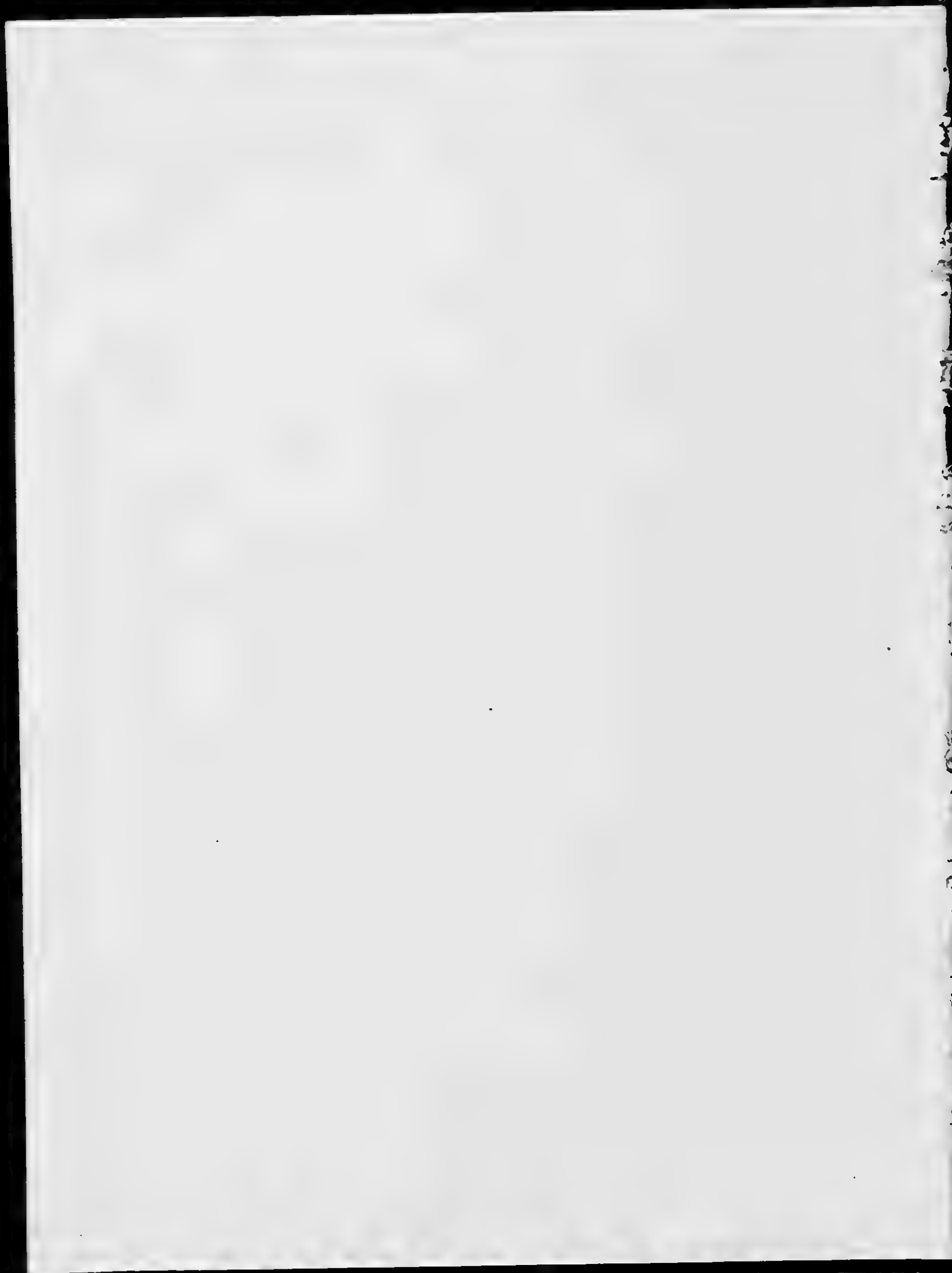
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JAMES E. WEBB, et al.,

Appellees,

and

NATIONAL COUNCIL OF TECHNICAL SERVICE INDUSTRIES,

Intervenor-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR APPELLEES

STATEMENT OF THE ISSUES PRESENTED

1. Whether the district court correctly held that government employees who have been subjected to a reduction-in-force by their employing agency may not seek judicial relief prior to the exhaustion of their administrative remedies.
2. Whether a union of government employees has standing to bring suit on behalf of those of its members who have been subjected to a reduction-in-force.

This case has not previously been before this Court.

STATEMENT OF THE CASE

This action was instituted on December 27, 1967, by a government employees' union and six employees of the National Aeronautical and Space Administration (NASA) seeking declaratory and injunctive relief against a reduction-in-force which was to take place on January 13, 1968, at the Marshall Space Flight Center, Huntsville, Alabama (Marshall) (J.A. 4-30). The reduction-in-force was mandated by budgetary considerations and initially called for the separation from government service, or the reduction in grade, of 869 employees (J.A. 61-62). By reason of developments subsequent to the commencement of the suit, however, the number of affected employees was decreased to 166 (56 separations and 110 reductions in grade) (J.A. 189). The gravamen of the complaint was that NASA had been contracting out to private industry many functions which could and should have been performed by government employees and that to impose a reduction-in-force while contract employees, doing similar work, remained on the job, violated the civil service laws. ^{1/}

Plaintiffs' motion for a preliminary injunction was heard on January 11, 1968. ^{2/} At that hearing, it was brought out

^{1/} The budgetary factors which necessitated the reduction-in-force also required a reduction in the number of contract employees utilized at Marshall (J.A. 129).

^{2/} The National Council of Technical Service Industries, a trade association composed of companies who have contracts with NASA at Marshall (J.A. 160), was permitted to intervene as a party defendant (J.A. 167-168). While the United States opposed the application for intervention, there is no occasion for this Court to consider the matter on this appeal.

that the General Accounting Office (GAO) and the Civil Service Commission (CSC) had been investigating NASA's personnel practices with respect to its hiring of contract employees. Both agencies had expressed some concern with respect to whether NASA had been fully complying with the civil service laws ^{3/} (see e.g., exhibits B, C and D to the complaint (J.A. 248-362)). NASA's position was that its use of contract personnel was specifically authorized by statute (42 U.S.C. 2473(b)(5)) ^{4/} and was consistent with its mandate to most effectively utilize "the scientific and engineering resources of the United States". 42 U.S.C. 2451(c)(8) (J.A. 58-64). Since the CSC was negotiating with NASA with respect to its personnel practices at Marshall (J.A. 126-129, 135), the district court was of the view that the status quo should be maintained until they agreed as to basic policy (J.A. 152-153). Accordingly, a preliminary injunction was entered, staying the reduction-in-force pending such an agreement (J.A. 154, 177-183).

3/ 42 U.S.C. 2473(b)(2) relevantly provides that NASA is authorized "to appoint and fix the compensation of such officers and employees as may be necessary to carry out [its] functions. Such officers and employees shall be appointed in accordance with the civil service laws * * * ."

4/ "(b) In the performance of its functions the Administration is authorized --

* * *

(5) without regard to section 529 of Title 31 [Advances of public moneys; prohibition against], to enter into and perform such contracts * * * as may be necessary in the conduct of its work and on such terms as it may deem appropriate, with *** any person, firm, association, corporation, or educational institution. * * * "

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On February 19, 1968, the CSC and NASA reached an agreement "concerning broad principles to be applied in connection with the reduction-in-force at the George C. Marshall Space Flight Center which eliminates any probable involvement of improper service contract operations as they may affect the reduction-in-force" (J.A. 188-189). Pursuant to that agreement, adverse personnel actions were cancelled as to all but approximately 166 employees originally affected; with these employees free to pursue their available administrative remedies with respect to the specifics of their individual cases (J.A. 189).^{5/} Accordingly, the district court, on application of the Government, vacated the preliminary injunction without prejudice to those employees unaffected by the agreement of principle pursuing their available administrative remedies (J.A. 197-200).

On April 18, 1968, the district court, finding that "the complaint does not set forth a valid claim for relief because the Court may not enjoin a Government agency from discharging any of its employees, nor may it issue a declaratory judgment" and finding that the adversely affected employees had not exhausted their administrative remedies (J.A. 217) entered an order dismissing the complaint (J.A. 218). This appeal followed.

^{5/} The cancellations apparently did not affect the six individual party plaintiffs (J.A. 191).

ARGUMENT

THE DISTRICT COURT CORRECTLY DIS- MISSED THE COMPLAINT.

As seen from the foregoing, this appeal presents two narrow issues: (1) whether the district court correctly held that the individual plaintiffs had to exhaust their administrative remedies before resorting to the courts; and (2) whether, in any event, the union lacked standing to maintain this action on behalf of its members. In these circumstances, there is no need for this Court to consider the legality of NASA's contracts for the performance of services at Marshall by private concerns or the effect of those contracts on the employment rights of the individual plaintiffs. Not only were the merits of the controversy not reached by the court below and cannot be resolved on the basis of the present record but, additionally, as will be seen they must be considered first by the CSC.

A. The individual plaintiffs have failed to exhaust their administrative remedies and therefore this suit is not presently maintainable by them or their union.

Government employees subjected to a reduction-in-force possess established administrative remedies by which they may challenge the adverse personnel action. 5 C.F.R. 351.901 provides that an employee aggrieved by a reduction-in-force may have an "initial appeal" to the Commission. If dissatisfied with the Commission's determination at this initial level, he

may appeal to the Board of Appeals and Review, 772.306; 772.307 (made applicable to reduction-in-force situations by 5 C.F.R. 772.301). While it appears that the individual plaintiffs have pursued their initial appeals (in two instances they have been denied (Appellants' Br. 54-59)) there have been no final decisions by the Board of Appeals and Review. In these circumstances the district court correctly dismissed this suit as premature.

It has been the "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 [1938]", F.C.C. v. Shreiber, 381 U.S. 279, 296-297 (1965). This "long settled rule" is, of course, applicable to reduction-in-force situations. Young v. Higley, 95 U.S. App. D.C. 122, 220 F. 2d 487 (1955); Hills v. Eisenhart, 256 F. 2d 609 (C.A. 9, 1958), certiorari denied, 358 U.S. 832; Burns v. McCrary, 229 F. 2d 286 (C.A. 2, 1956).^{6/}

^{6/} Plaintiffs reliance on Wettre v. Hague, 168 F. 2d 825 (C.A. 1, 1948) and its progeny is misplaced. Not only has that decision been largely vitiated in its own circuit, Fitzpatrick v. Snyder, 220 F. 2d 522 (C.A. 1, 1955), certiorari denied, 349 U.S. 946, but this Court has expressly refused to follow it. Young v. Higley, supra, 95 U.S. App. D.C. at 123, 220 F. 2d at 488.

The reasons why the aggrieved employee must first exhaust his administrative remedies are apparent. Apart from the "problems of forum shopping and unnecessary waste of judicial energies and resources" discussed by this Court in a related context in Sohm v. Fowler, 124 U.S. App. D.C. 382, 384, 365 F. 2d 915, 917 (1966), there is the consideration that the CSC is the agency which has been charged by Congress with the administration and enforcement of the civil service laws. 5 U.S.C. 1104(a)(5)(A).

That, no less than other adverse personnel actions, reductions in force are within the area of CSC responsibility is clear from 5 U.S.C. 3502, which provides that the CSC "shall prescribe regulations for the release of competing employees in a reduction in force * * * ." And, in the implementation of this statutory directive, the CSC has promulgated detailed regulations which, among other things, establish the standards to be applied in determining whether a particular employee is to be subjected to a reduction in force. See 5 C.F.R. Part 351. It is the CSC's function to insure that there is compliance with these standards and to direct corrective action where there has been a failure of such compliance. 5 C.F.R. 351.902(b); 772.307(c). Only after this function has been discharged -- and there has been a determination adverse to the employee on the final appellate level within the CSC (i.e., by the Board of Appeals and Review unless the Commissioners choose to exercise their own discretionary power of

reconsideration (5 C.F.R. 772.308)) -- does judicial review come into play. That review is of course of limited scope and is based upon the record developed in the administrative proceedings and the findings made by the CSC on that record. Eberlein v. United States, 257 U.S. 82 (1921); Eustace v. Day, 114 U.S. App. D.C. 242, 314 F. 2d 247 (1962); Powell v. Brannan, 91 U.S. App. D.C. 16, 196 F. 2d 871 (1952).

It need be added only that there is no merit to the contention that the individual plaintiffs should not be required to exhaust their administrative remedies if, as they insist, NASA has erroneously subjected them to a reduction-in-force. First, it is settled in this Circuit that "The fact that administrative action is probably erroneous does not create an exception to the rule that administrative processes must be exhausted before judicial relief is sought". Johnson v. Nelson, 86 U.S. App. D.C. 98, 180 F. 2d 386 [1950] certiorari denied 339 U.S. 957"; Young v. Higley, supra, 95 U.S. App. D.C. at 122, 220 F. 2d at 487. Second, while the application of the exhaustion doctrine does not turn on speculations as to what the ultimate result on the administrative level might be, we note that there is no reason to believe that the CSC will not give the aggrieved employees a fair hearing. Indeed, as exhibit D to the complaint indicates (J.A. 295-362), the CSC has demonstrated a strong concern that contract employees not displace civil service employees doing similar work. If the specific facts of the individual appeals merit corrective

action, such action will be taken. If, following the final decision by the Board of Appeals and Review they are still aggrieved, the individual plaintiffs may, of course, get review in the district court. And if their position is vindicated either by the Commission or, on judicial review, by the courts, they will be reinstated with "all or any part of the pay, allowances, or differentials" they would have received had the adverse personnel action not occurred. 5 U.S.C. 5596.

B. In any event, Lodge 1858 may not maintain this action on behalf of its members.

It is obvious that if the requirement of exhaustion of administrative remedies is to have any vitality at all, it may not be defeated by the simple expedient of allowing the union to seek a declaration of the rights of its members prior to a final decision by the Commission.^{7/} In any event, the Lodge does not satisfy the two interrelated requirements for its maintenance of this suit; (1) the union is not a member of the class it seeks to represent as required by Rule 23, Federal Rules of Civil Procedure; and (2)^{8/} it is not the real party in interest as required by Rule 17. Rock Drilling, etc. v. Mason & Hanger Co., 217 F. 2d 687 (C.A. 2, 1954), affirming

7/ The collective bargaining agreement explicitly recognizes the applicability of the established civil service laws and regulations. Article III, sec. 1 (J.A. 221).

8/ "The plaintiff or defendant representative must be a member of the class which he purportedly represents. * * * Even without this provision, the real party in interest rule would require the same holding in many cases." 3A Moore's Federal Practice, ¶23.04, p. 3419 (2d ed.).

90 F. Supp. 539 (S.D.N.Y., 1950), certiorari denied, 349 U.S. 915.

The union seeks to enforce no substantive legal rights of its own.^{9/} Its right to operate as a union of government employees "exists only by express leave of the President, Exec. Order No. 10988, 27 Fed. Reg. 551 (1962)", Amell v. United States, 384 U.S. 158, 161 (1966). And while a union recognized pursuant to the executive order may negotiate and bargain, it may not maintain legal actions on their behalf. For, as E.O. 10988 does not give unions the right to sue even though alleging injury qua unions (Manhattan-Bronx Postal Union v. Gronouski, 121 U.S. App. D.C. 321, 350 F. 2d 451, certiorari denied, 382 U.S. 978 (1965); National Assn. of Int. Rev. Employees v. Dillon, 123 U.S. App. D.C. 58, 356 F. 2d 811 (1966)), a fortiori it does not confer standing to maintain this suit.

The union's reliance on the collective bargaining agreement and the authorities construing Section 301 of the Labor Management Relations Act, 29 U.S.C. 185 is misplaced.^{10/}

^{9/} As did, for example, the National Association for the Advancement of Colored People in N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958).

^{10/} Significantly, one of the specifications of an alleged violation, to wit: that there was no consultation with the union with respect to the reduction-in-force (Br. 19) seems to be contradicted by Exhibit E to the complaint, a letter from NASA's Director of Personnel to the Union dated December 12, 1967. It refers to "several discussions" had with respect to the proposed reduction-in-force (J.A. 363). The

[continued]

First, the agreement does not recognize a resort to the courts in aid of its enforcement. To the contrary, Article XXIX specifically provides that "[m]atters which involve failure by the Union or the Employer to comply with the provisions of this Agreement shall be referred for resolution to the Personnel Officer and the President of the Union" (J.A. 246). Second, Section 301, which specifically confers standing upon unions to maintain suits on behalf of their members based on violations of collective bargaining agreements, does not apply to unions representing government employees. Labor Management Relations Act, Section 2(2), 29 U.S.C. 152(2). Additionally, consistent with excluding government unions from the ambit of the Labor-Management Relations Act is Executive Order 10988's recognition that, exclusive representation by a union evidenced by a collective bargaining agreement notwithstanding, "[m]anagement officials of the agency retain the right, in accordance with the applicable laws and regulations, * * * (b) to hire, promote, transfer, assign and retain employees in positions within the agency, and to suspend, demote, discharge or take other disciplinary action against employees,

10/ [continued] other so called violations basically revolve around the union's position that NASA failed to retain civil service employees "to the maximum extent feasible" (Br. 18-20). This criticism of NASA's conduct is of course based on subjective considerations which E.O. 10988 left to agency discretion. See Section 7(2) quoted infra.

(c) to relieve employees from duties because of lack of work or for other legitimate reasons, (d) to maintain the efficiency of the Government operations entrusted to them, (e) to determine the methods, means and personnel by which such operations are to be conducted * * * ." E.O. 10988, sec. 7(2), 27 F.R. at 554.

In sum, it is clear that Lodge 1858, as a union of Government employees has no standing to maintain this suit on behalf of its members who have been subjected to the reduction-in-force.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court dismissing this action be affirmed.

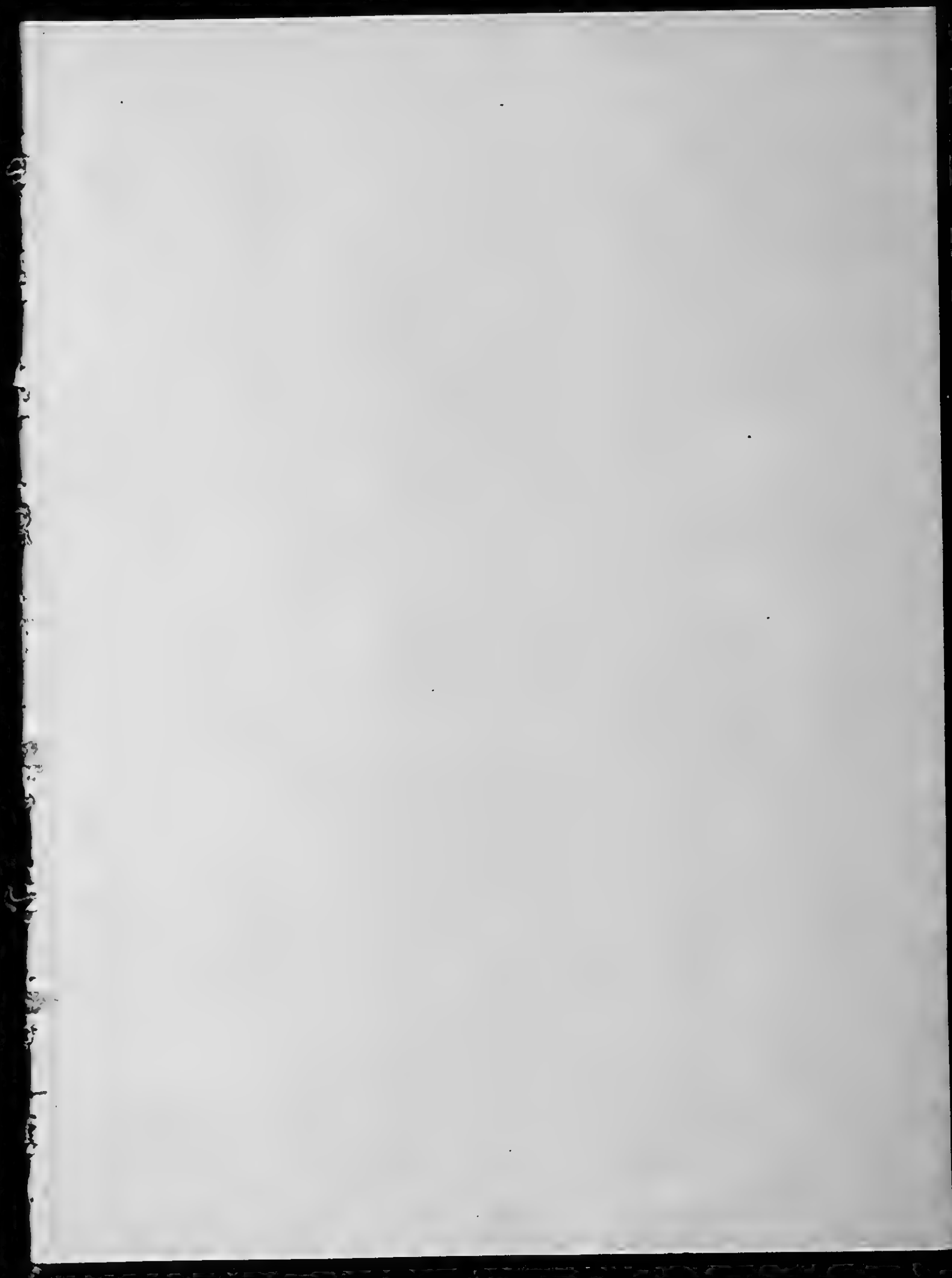
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OCTOBER 1968.



APPELLANTS' REPLY BRIEF

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,006

LODGE 1858, AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, ET AL., *Appellants*

v.

JAMES E. WEBB, ADMINISTRATOR, NATIONAL AERONAUTICS
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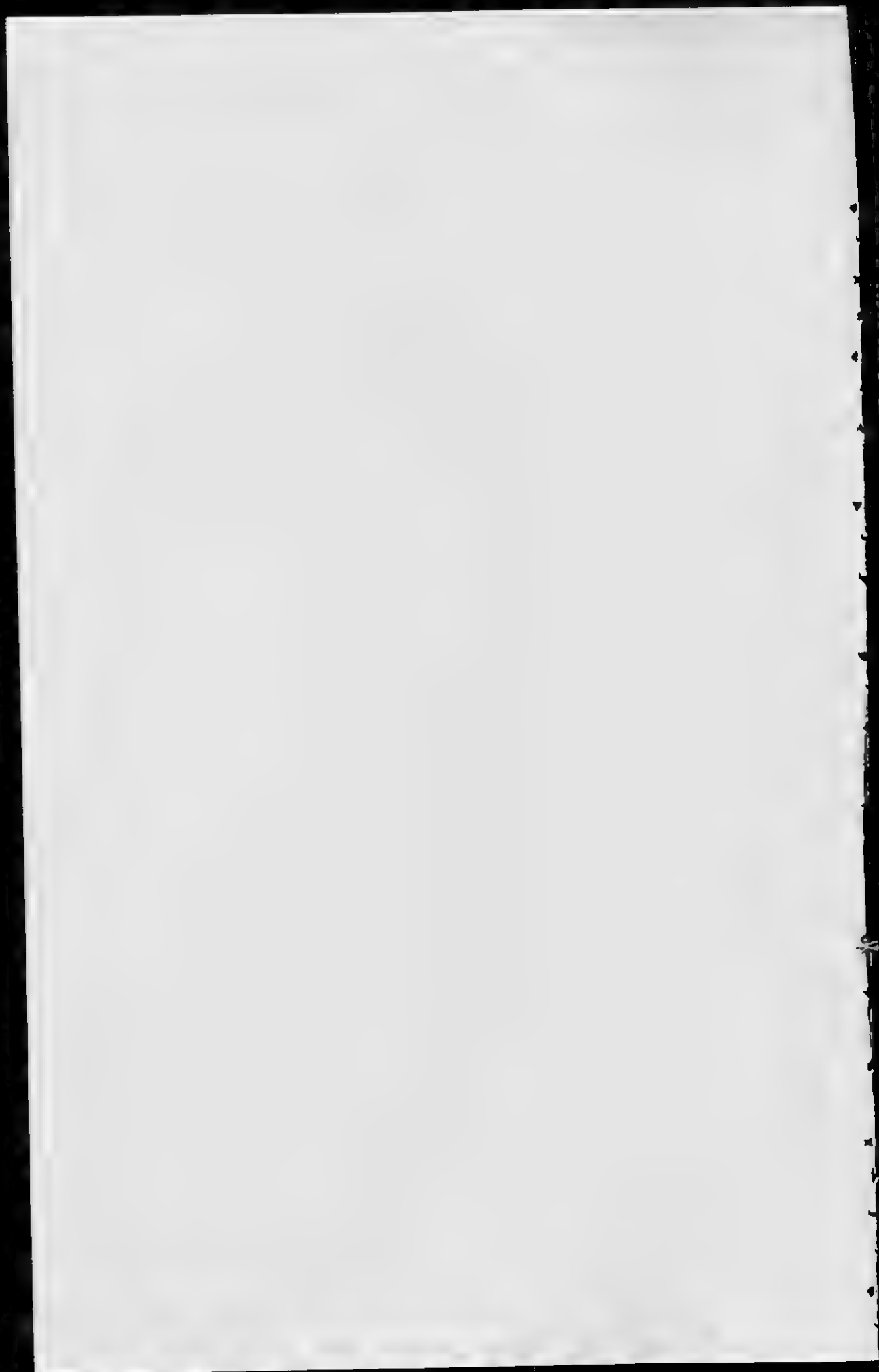
On Appeal From a Judgment of the United States District
Court for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 18 1968 EDWARD L. MERRIGAN
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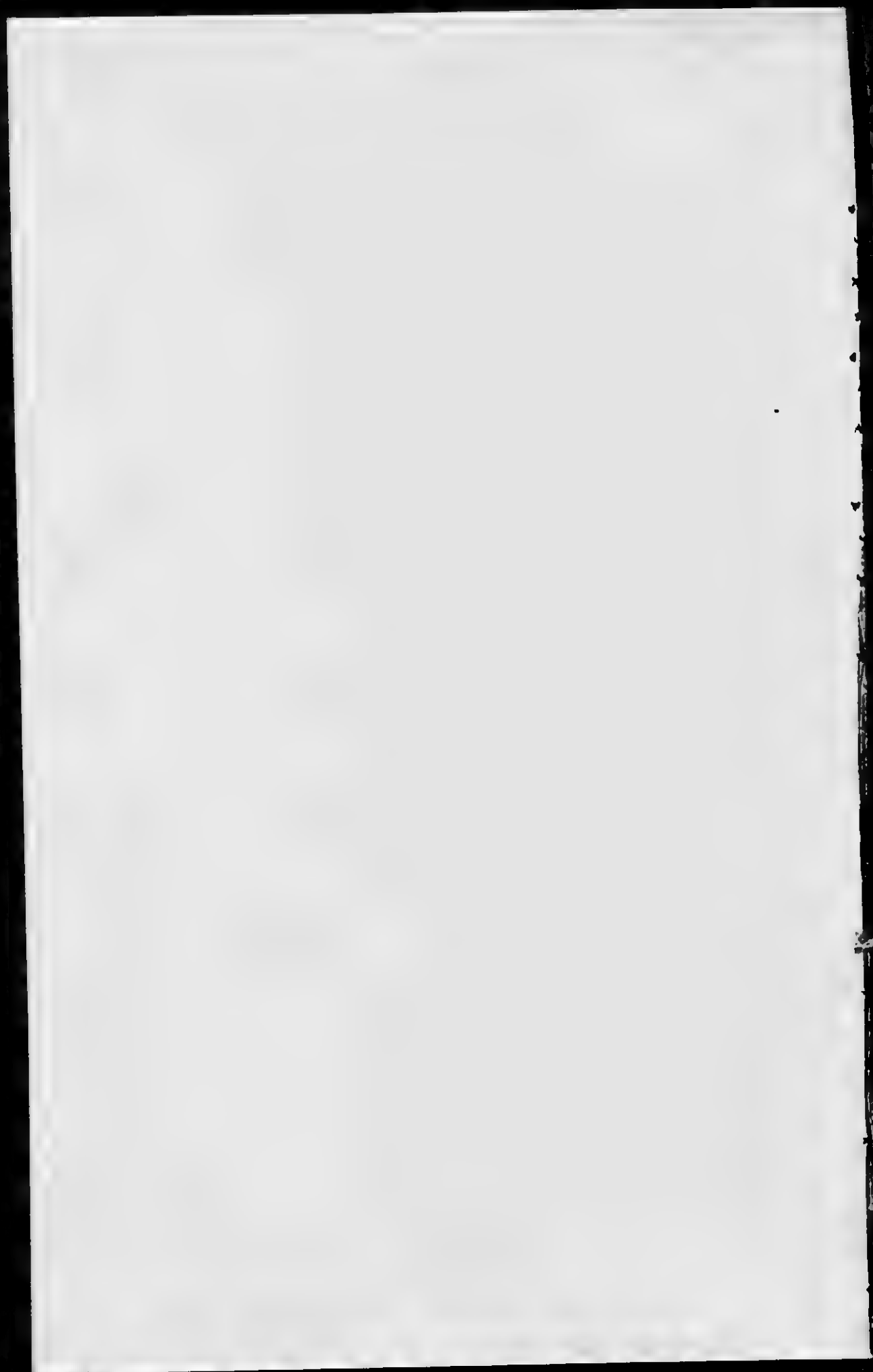
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AND SPACE ADMINISTRATION, ET AL., *Appellees*

and

NATIONAL COUNCIL OF TECHNICAL SERVICE INDUSTRIES,
Intervenor-Appellee

On Appeal From a Judgment of the United States District
Court for the District of Columbia

APPELLANTS' REPLY BRIEF

I.

**The Exhaustion Of Administrative Remedies Doctrine Does
Not Bar The Complaint In This Case**

Both the Government and NCTSI contend in their briefs that the complaint was properly dismissed by the District Court because "*the individual plaintiffs* have failed to exhaust their administrative remedies" before the Civil Service Commission. The short, simple answer to that contention is as follows:

1. It has no bearing whatsoever on the right of Lodge 1858 of the American Federation of Government Employees to maintain the complaint insofar as it is based on

NASA's alleged breach of the collective bargaining contract with Lodge 1858. Indeed, appellees apparently concede that Lodge 1858 had no available "administrative remedy" before the Commission or before any other agency with regard to that cause of action.

2. The record before the Court also shows that the individual appellants in this case likewise never possessed any *effective* "administrative remedy" which they were required to exhaust, as a matter of law, before this action could be maintained. From the very outset, and continuously since, the Commission has taken the position that it is powerless to determine, upon a federal employee's appeal from NASA's reduction-in-force action, "whether or not any contract between NASA and a private firm is improper or has resulted in the procurement of personal services in violation of the Federal personnel laws"; or whether such contracting practices have resulted in violation of the federal statutory retention rights of Government employees who are dismissed from their positions and replaced by contractor employees (See *Appendix, Appellants' Main Brief*, pgs. 54-58). In fact, even before this action was commenced, Chairman Macy of the Commission was on record as stating (J.A. 25):

"The Commission (is) powerless to intercede . . . because NASA is solely responsible".

As stated in our main brief, in the face of circumstances such as these, the courts in the federal system have regularly held that whenever the pursuit of an administrative remedy is clearly futile and harm from the continued existence of agency action is great, district courts should exercise immediate jurisdiction and not compel parties to exhaust an illusory administrative procedure (*Wolff v. Selective Service Board*, OCA 2, 1967, 372 F. 2d 817, 825; *McCulloch v. Sociedad Nacional*, 372 U.S. 10, 16; *Leedom v. Kyne*, 358 U.S. 184; *Lichter v. U. S.*, 334 U.S. 742; *Glover v. U. S.*, CCA 8, 1961, 286 F. 2d 84; *Bullard Co. v. N.L.R.B.*, D.C., D.C., 1966, 253 F. Supp. 391).

In the case at bar, therefore, the time-worn argument that a federal court must withhold equitable relief until

dismissed civil service employees have exhausted a spurious administrative remedy is baseless indeed. Here, the Verified Complaint, fully supported by the Reports of the Comptroller General and the Opinion of the General Counsel to the Civil Service Commission, alleges that the proposed removals are directly in violation of federal law; and that same are part and parcel of NASA's wilful attempt to defeat, frustrate and circumvent the requirements of the federal Civil Service laws and the NASA Act of 1958. Simultaneously, defendant Civil Service Commission contends it has no jurisdiction to intercede with NASA or to grant any administrative relief to the employees involved. Finally, the record shows that after this action was commenced, NASA and the Commission openly conceded, by written agreement, that 598 of the 764 proposed reductions in force were illegal, and same were cancelled—leaving 166 federal civil service employees with the complaint in this action as their only means and hope for relief. Patently, therefore, it was erroneous and unjust for the District Court to dismiss that complaint and to deny any equitable relief whatsoever to those 166 employees after the Court granted full, appropriate, effective injunctive relief to the other 598.

Under somewhat similar circumstances, the District Court for the District of Columbia correctly held in *Group v. Finletter*, D.C., D.C. 1952, 108 F. Supp. 327, 328 that “where it is undisputed that a plaintiff's legal rights are being violated, there is no longer any occasion for the requirement that plaintiff must exhaust whatever administrative remedies he may have before seeking to vindicate his rights in Court . . .” And, in *Reeber v. Russell*, D.C. N.Y. 1950, 91 F. Supp. 108, Judge Kaufman of the District Court in New York applied the same reasoning and stated, at page 113:

“Furthermore, there is no question peculiar to the administrative field which must be determined in the cases of these plaintiffs. The regulations issued by the Civil Service Commission and the Veterans' Administration are not in dispute; the question before the Court is essentially one of law, i.e., whether the

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regulations issued and steps taken by the defendant are in violation of the Acts of 1912 and 1944. Therefore, the Court believes that the bringing of the action by the plaintiffs at this time is proper.

"The Court also feels that an injunction could be granted solely in the exercise of its equity powers, even if this action had not been brought for a declaratory judgment, but only for an injunction to maintain the *status quo* during the pendency of the administrative proceedings . . .

"It is therefore the holding of this court that there is no procedural or jurisdictional bar to the granting of the relief now sought by the plaintiffs. As to the substantive right to such relief, the plaintiffs, as mentioned above, do show a right to the relief requested in their action, and it appears to this Court that they will be irreparably damaged if the temporary injunction is not granted, there being no adequate remedy at law.

"Therefore, the defendants are enjoined from separating the plaintiffs . . . from their present positions in the Veterans Administration or from reducing them in rank or salary pending the determination of this action."

The Court's attention is also directed to the fact that Judge Holtzoff *originally* correctly applied the very *same reasoning and logic in this case* and ruled, at J.A. 152, 153:

"This Court has frequently had occasion to emphasize the well established doctrine, and to apply it vigorously, that the courts should not ordinarily interfere with the day-to-day operations of Government departments *unless it is clear that some illegal act is being committed, and the courts may then intervene only to prevent the continuance of the illegal act . . .*

"The Court is of the opinion that it is proper for the Court to grant a temporary injunction to restrain the separation from the service of the employing agency of those employees who have a permanent Civil Service status . . . *until administrative remedies are exhausted by the employees . . .*"

Two months later, however, and solely because the defendants represented that they, NASA and the Commis-

sion, had unilaterally reached an agreement whereby 598 of the 764 proposed removals were to be cancelled, Judge Holtzoff inexplicably reversed his position, vacated the preliminary injunction and dismissed the complaint, leaving the remaining 166 federal civil service employees without any relief whatsoever.

In their brief before this Court, Government appellees now rely on this Court's decisions in *Johnson v. Nelson*, 86 U.S. App. D.C. 98 and *Young v. Higley*, 95 U.S. App. D.C. 122, to contend speciously that (a) it is settled in this Circuit that even when an administrative action is clearly erroneous, the federal employee confronted with irreparable injury from such illegal action must still exhaust all administrative processes before judicial relief can be sought; and (b) in all such cases, it must be presumed that the Civil Service Commission will give the aggrieved employee "a fair hearing". First, neither of those decisions establishes the broad, inflexible rule attributed to it by appellees; and secondly, each of those two cases is clearly distinguishable from the case at bar. Indeed, in the instant case the Commission has repeatedly contended on the record that "a fair hearing" on the issues here presented *cannot* be afforded by the Commission *because the Commission has no jurisdiction or power to decide those issues or to grant relief to the employees affected by NASA's illegal contracting practices.*

In *Johnson v. Nelson*, *supra*, Navy Department employees, simply reduced in grade during a reduction-in-force, moved for summary judgment in the district court to nullify those personnel actions *before any of them pursued their administrative appeal to the Commission.* In other words, plaintiffs in that case asked the court to render judgment in their favor on the merits and the Civil Service Commission relinquished its jurisdiction in favor of the Court. This Court understandably reversed a summary judgment in their favor, holding that federal employees may not completely short-circuit an administrative appeal by coming to the courts for judicial relief before the Commission is given any opportunity to review their cases. Never-

theless, this court was careful to note in *Johnson v. Nelson* that a different jurisdictional rule might be applied in other cases involving discharges instead of demotions.

Likewise, in *Young v. Higley, supra*, the federal employees involved, already removed from their positions, again failed even to file an administrative appeal with the Commission before turning to the district court for judicial relief. *In fact, the plaintiffs in that case let the administrative appeal time expire, and then, and only then, did they apply to the District Court for judicial relief completely in lieu of the administrative remedy.* Again, therefore, this Court correctly ruled that the courts are powerless to render judgment on the merits in such a case entirely in lieu of a defaulted administrative appeal.

In fact, in its decision, in *Green v. Baughman*, 214 F. 2d 878, this Court sought to make it perfectly clear that while the District Court cannot (a) enjoin the Civil Service Commission from proceeding with an administrative appeal or (b) completely substitute its judgment for the Commission's on the merits before the administrative appeal is exhausted, the Court may, where necessary in equity, grant preliminary injunctive relief to preserve the *status quo* until the administrative proceedings are exhausted, or until it becomes clear that no effective administrative remedy is available. In this regard, please see also *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 773-774, a decision of the Supreme Court upon which the Court of Appeals relied in its decision in *Green v. Baughman*; and *United Gas Pipe Line Co. v. Federal Power Commission*, 86 U.S. App. D.C. 314, cert. denied, 340 U.S. 827.¹

¹ The decisions of the First Circuit in *Fitzpatrick v. Snyder*, 220 F. 2d 522 and the Ninth Circuit in *Hills v. Eisenhart*, 256 F. 2d 609 are equally not apposite. In *Fitzpatrick*, the District Court again passed on the merits of the employee's complaint before he pursued an administrative appeal to the Commission. On appeal, the First Circuit ruled the District Court had no power to do that because the plaintiff's complaint did not allege that his removal violated "a clear statutory right to be retained". In *Hills v. Eisenhart*, the Ninth Circuit likewise refused to entertain a case where the em-

Perhaps the most effective way to point up the real, significant difference between the complaint in this case and those in *Johnson v. Nelson, supra, Young v. Higley, supra*, and other similar cases wherein plaintiffs sought to gain judicial relief as a means of avoiding, or before they commenced, available, effective proceedings before the Civil Service Commission, is to direct the Court's attention to the prayer for relief in the complaint in this action. There, at J.A. 30, appellants in this case ask that declaratory and *mandatory* injunctive relief be granted herein *against the Civil Service Commission itself*—

“Directing and ordering defendant Civil Service Commissioners, within the scope of authority conferred upon them by Title 5 of United States Code and otherwise, to take such steps as may be necessary, during the pendency of this action and permanently, to enforce and administer the federal civil service and personnel statutes and its own regulations in such manner as to prohibit defendant Webb and the agency he administers from continuing to make and perform personnel contracts with private corporations pursuant to which said corporations, for large fees and profits, do no more than furnish non-civil service employees to NASA's Marshall Space Flight Center to perform functions of the Government which, as a matter of law, must and should be performed by civil service employees who are readily available for employment through the regular channels of the Civil Service System of the United States; and from utilizing such contracts as a means of obtaining non-civil service job replacements for civil service employees unlawfully removed from their positions with the United States.”

In other words, in this case, appellants, confronted by *the Commission's alleged inability to afford any effective relief to the employees involved as part of their administrative appeals to the Commission*, urge the Court to grant

employees involved attempted to obtain judicial relief *on the merits* in lieu of an allegation that they had “no administrative appeal from the threatened action”. In other words, again the plaintiffs were asking the Court to pass on the merits of the case *completely in lieu of any attempt at relief before the Civil Service Commission*.

judicial relief against the Commission, directing defendant Commissioners to take whatever steps are available to them at law (*and beyond the limits of the administrative appeals*) to compel NASA to comply with the federal personnel laws and its own 1958 enabling statute; and to prohibit NASA from removing the plaintiffs and others in their class from their civil service positions, only to replace them with private contractor employees, illegally obtained through unlawful contract procedures.

In this regard, the record before the Court demonstrates that the Commission does have such authority to proceed against NASA *directly* (i.e., outside of and beyond the administrative appeal procedures) to require it to comply with the federal civil service laws and to terminate illegal personnel contracts which, if continued, threaten to destroy the integrity and force of the entire Civil Service System (J.A. 300-302). In this connection, the Opinion of the General Counsel to the Civil Service Commission states, at J.A. 300:

"The Commission's authority and responsibility to interpret and administer the personnel laws to effectuate their purposes have long been recognized by the Attorney General, by the Congress, and the courts. See H.R. Rep. No. 188, 89th Cong., 1st Sess. (1965), and authorities cited therein; see also *Born v. Allen*, 291 F. 2d 345 (D.C. Cir. 1960); *Adelstein et al v. Macy et al*, 265 F. Supp. 771 (E.D. N.Y., 1967)."

And, at J.A. 299, 300:

"NASA contends that General Accounting Office has the final authority to decide the legality of contracts . . .

"We see no necessity for a discussion of the authority of the General Accounting Office vis-a-vis that of the Civil Service Commission to decide that a contract is illegal because it contravenes the civil service laws . . . Consequently, in this opinion we will consider the legality of the contracts with respect to their terms, as well as with respect to operations carried on under them."

And, finally, at J.A. 351:

"Corrective Action Required.

We are advised by NASA that it plans to rectify all violations and that . . . all necessary action will be undertaken to have the involved functions performed by civil service employees . . . In the absence of specific legislative authority to continue the contracts under review, we are of the view that orderly termination or conversion is required."

Accordingly, instead of seeking judicial relief in this case as a means of short-circuiting the administrative remedy before the Commission, appellants here seek judicial relief to compel the Commission to take whatever other steps and actions are available to it at law (i.e. beyond the limits of the fruitless, futile administrative appeals procedures) to compel NASA to obey the federal personnel laws and to cease discharging plaintiffs and other civil service employees in their class, only to replace them with private contractor employees, illegally obtained by NASA through the device of unlawful personnel contracts.

II

Lodge 1858 Has Standing To Sue For The Alleged Breach Of Its Collective Bargaining Contract With NASA

In their brief, Government appellees contend that Lodge 1858 has no standing to sue because (1) it seeks to enforce no substantive legal rights of its own; (2) it is not a member of the class it seeks to represent as required by Rule 23 of the Federal Rules of Civil Procedure; and (3) it is not the real party in interest as required by Rule 17 of the Federal Rules.

It is difficult to understand how anyone who has read the complaint in this action could possibly contend that Lodge 1858 does not seek to enforce any substantive legal rights of its own in this case. At Paragraph 28 of the complaint (J.A. 22-25), Lodge 1858 expressly asserts that "NASA's . . . proposal to remove hundreds of civil service employees . . . employed within the collective bargaining

unit Lodge 1858 represents at the Marshall Space Flight Center . . . violates . . . the terms and conditions of the collective bargaining agreement between NASA and Lodge 1858 . . .” And, in the prayer for relief at the end of the complaint, Lodge 1858 seeks “a declaratory judgment declaring . . . that under the facts and circumstances set forth in the complaint and established in this action, defendant Webb and the National Aeronautics and Space Administration he administers are prohibited and precluded by Executive Order 10988 and the collective bargaining agreement between NASA and plaintiff Lodge 1858 of the American Federation of Government Employees from removing, without cause, any of the individual plaintiffs or any other civil service employees presently employed in the collective bargaining unit represented by said Lodge 1858 . . . as part of the currently unlawful proposed reduction-in-force.” (J.A. 27-29).

In this regard, the record before the Court also shows that NASA, as part of its collective bargaining contract with Lodge 1858, expressly recognized “the Union as the exclusive bargaining agent, under the provisions of Executive Order 10988, for all employees in the unit” (J.A. 220). As a *quid pro quo* for such recognition, Lodge 1858 made the following undertaking (J.A. 220):

“The Union recognizes the responsibilities of, and agrees to represent, fairly and equitably, the interests of all employees within the unit with respect to grievances, personnel policies, practices and procedures or other matters affecting their general working conditions . . .”

Clearly, therefore, Lodge 1858 has standing to sue in this action to enforce the substantive legal rights afforded to it by the terms of the collective bargaining contract with NASA. Indeed, Lodge 1858 is duty-bound by the said contract “to represent . . . the interests of all employees within the (bargaining) unit with respect to . . . (all) matters affecting their general working conditions”.

Equally specious is the contention that Lodge 1858 is barred from bringing this action to enforce the terms of

the collective bargaining contract to which it is a party because (a) it is not a member of the class it seeks to represent and (b) it is not the real party in interest. That same baseless contention has been advanced in other cases and it has been uniformly rejected many times before (*United Automobile Workers v. Wilson Athletic Goods Mfg. Co., Inc.*, E.D. Ill., 1950, 119 F. Supp. 948; *Smith v. Baltimore & Ohio Railroad Company*, S.D. Ohio, 1956, 144 F. Supp. 869, affd. 251 F.2d 282 (OCA 6, 1958) cert. denied, 356 U.S. 937; *Division 700, Bro. of Local Eng. v. National Ry. Labor Arb. Bd. No. 282*, D.C. D.C., 1963, 224 F. Supp. 366; *United Steelworkers of America v. Copperweld Steel Co.*, W. D. Pa. 1964, 230 F. Supp. 383).

In *U.A.W. v. Wilson Athletic Goods Mfg. Co., Inc.*, *supra*, the union there involved brought suit for breach of a collective bargaining contract and alleged that the employer-defendant had failed to grant certain employees in the bargaining unit paid vacations. Like appellees in the case at bar, the employer moved to dismiss the complaint on the ground that the union was not the real party in interest, as required by Rule 17 (a) and (b) of the Federal Rules; and the union was not a member of the class of employees it sought to represent, as required by Rule 23 of the Federal Rules. The District Court denied the motion to dismiss, stating at page 949:

“Defendant’s contentions are untenable and the motion to dismiss must be denied. Quite clearly, the complaint states a claim upon which relief can be granted. This is a contract action . . .

“Neither Rule 17 nor Rule 23 is applicable here . . .”

In *United Steelworkers v. Copperweld Steel Co.*, *supra*, the Union filed an action “to enforce the pension, insurance and vacation pay rights of approximately 900 production and maintenance workers under various collective bargaining agreements with Copperweld”. The union, like Lodge 1858 in the case at bar, was “the authorized collective bargaining representative” for the employees involved.

Copperweld appeared in the action and, like appellees in this case, moved to dismiss the complaint on the grounds that the union was not the real party in interest and the employees themselves, allegedly indispensable, did not join in the action as plaintiffs. The District Court in Pennsylvania denied the employer's motion to dismiss, stating at page 387:

Thus, we cannot agree with defendant Copperweld that plaintiffs have failed to join indispensable parties. Plaintiffs, who represented their members in collective bargaining sessions, have brought this action in their own names for the benefit of those individual Union members who are third party beneficiaries of the contracts out of which this action arises. Plaintiffs therefore are the real parties in interest within the meaning of Rule 17(a) . . . For the reasons stated, the motion of defendant Copperweld to dismiss the complaint must be denied."

The only authority cited by Government appellees in support of their specious contentions under Rules 17 and 23 is *completely inapposite*. In that case, *Rock, Drilling, Blasting, Roads Union No. 17 v. Mason & Hangar Co.*, 90 F. Supp. 539 (1950), the action brought by the union was *not predicated on a collective bargaining agreement to which the union was a party*. On the contrary, the union, acting for its members, sued the defendant company to recover \$600,000. in damages allegedly sustained by its members when the defendant company bribed an officer of the union to encourage him to agree to make union workers available at low wages. The District Court in New York correctly granted the company's motion to dismiss, stating, at page 543:

"Here the complaint makes it crystal clear that (1) plaintiff is *not suing on a contract to which it is a party*; . . . Consequently, . . . it appears that the complaint fails to state a claim upon which relief can be granted for the reason that the action is brought by one who is not the real party in interest." (Italics supplied).

III

The Right Of Lodge 1858 To Operate As A Union Of Government Employees And To Sue And Be Sued On Its Contracts Does Not Depend Entirely On Executive Order 10988. As Government Appellees Contend

Executive Order 10988 was promulgated by President Kennedy in 1962. By that time, the American Federation of Government Employees and its various lodges had been operating as "a union of Government Employees" for almost 30 years. 5 U.S.C. 7101 (formerly 5 U.S.C. 652 (c)), entitled "*Employee Organizations'-Right to Organize*", was regularly construed by both the Executive and Judicial branches of the Government to authorize all types of federal employees to organize unions, the objectives of which were to obtain "improvements in the working conditions of its members, including hours of work, pay and leaves of absence".

Consequently, completely contrary to the unqualified statement made by Government appellees at page 10 of their brief herein, Lodge 1858's "right to operate as a union of government employees" does not exist *solely* by leave of the President (Executive Order 10988). In fact, as demonstrated in appellants' main brief herein, by the time Executive Order 10988 was promulgated by President Kennedy in 1962, numerous agencies of the United States were already parties to existing collective bargaining contracts with unions of federal employees, and hundreds of thousands of federal employees were already members of federal employee unions.

Also, long before Executive Order 10988 was issued by the President, Lodge 1858, like all other unincorporated labor unions, was authorized by Congress to "sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States" (29 U.S.C. 185 (b)). Congress went on to provide: "Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall

not be enforceable against any individual member or his assets" (29 U.S.C. 185 (b)). Finally, Congress provided:

(c) "*Jurisdiction*—For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) *Service of Process*—The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization."

Based on these provisions of 29 U.S.C. 185, the American Federation of Government Employees has been subjected to the jurisdiction of the United States District Court for the District of Columbia on at least two occasions in recent years (*Office Employees International Union v. American Federation of Government Employees*, D.C., D.C., Civil Action No. 2000/65; and *Lodge 62, American Federation of Government Employees v. American Federation of Government Employees*, D.C., D.C., Civil Action No. 2150/1968). In the first mentioned action, Judge Corcoran, after a trial, rendered a judgment under 29 U.S.C. 185 (*Section 301, Taft Hartley Act*) directing the Federation to proceed to arbitration with reference to a dispute between the two unions growing out of a collective bargaining contract. The second action was entertained by the District Court, but was later dismissed without prejudice to its refiling. And, of course, as early as 1945, this Court ruled that an unincorporated labor union has capacity in its own name to sue and be sued in the courts of the District of Columbia and that service of process on the President of the union is good and sufficient

(*Busby v. Electric Utilities Emp. Union*, CCA, D.C. 1945, 79 U.S. App. D.C. 336, 147 F.2d 865).

With this background, therefore, it is clear that Lodge 1858, an unincorporated labor union, has full standing to sue in the courts of the District of Columbia to enforce its contracts, to collect payment of any debts due and owing to it, and to obtain relief in equity as the facts and circumstances of each particular case require.

Thus, the only remaining question is whether Lodge 1858, having made a binding collective bargaining contract with NASA, has the same right to sue for specific performance of that contract as it has to sue for the specific performance of any other contract to which it, Lodge 1858, is a party.

Appellants submit that when it comes to the enforcement of contracts or suits for breach of contract, the Government stands in no better position than a private contracting party who has breached and violated his agreement. Clearly, the labor contract here involved is an authorized agreement. It was made by NASA pursuant to an Executive Order of the President; its provisions are clear and precise; and the Verified Complaint alleges that NASA has breached that contract in several material respects. In such circumstances, the law is clear that the District Court had jurisdiction to entertain the complaint on its merits and to grant such equitable relief as might be appropriate to compel NASA to perform its contract with Lodge 1858, as it originally agreed to do.

In this regard, the rule is stated in 91 Corpus Juris Secundum, at page 220 as follows:

"In general, the same acts or omissions which would constitute a breach of contract by an individual constitutes a breach when done or omitted by the government. In ordinary transactions between the government and individuals, the failure of the government's officers to observe its express contractual obligations constitutes a breach of contract, subjecting the govern-

ment to suit . . . Also, acts and conduct of government officers which are arbitrary, capricious or unauthorized and so grossly erroneous as to imply bad faith amount to a breach of contract"²

Accordingly, as stated in our main brief, the complaint in this case, based on NASA's collective bargaining contract and the breach thereof, is in no respect barred by this Court's decisions in *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451, cert. denied, 382 U.S. 978 and *NAIRE v. Dillon*, 356 F.2d. 811.

IV.

Appellants Have Standing To Challenge Governmental Action Which Creates And Maintains Unlawful Competition And Threatens Appellants With Loss Of Jobs, Earnings And Dilution Of Their Collective Bargaining Unit.

In its brief, National Council of Technical Service Industries contends that appellants have no standing to maintain this suit because they have no right to challenge governmental action which creates "*lawful competition*" for either Lodge 1858 or the individual appellants, or both.

That argument absolutely disregards the nub of the Verified Complaint in this case, which is supported by the Reports of the Comptroller General and the Opinion of the General Counsel to the Civil Service Commission, and as well by NASA's own regulations (NPC 401) entitled "*NASA Policy and Procedures for Use of Contracts for Nonpersonal Services*" (J.A. 265).

The complaint clearly asserts that appellants are confronted with a devastating "*unlawful competition*"; that such competition, consisting of NASA's increased *illegal*

² A government agency's "authority" to enter into a binding contract may be conferred by Executive Order of the President of the United States (*United States v. Adams Packing Assn. Inc.*, COA 5, 1952, 197 F. 2d 33, cert. denied, 344 U.S. 865). Here, the collective bargaining contract was authorized by Executive Order 10988, issued pursuant to 5 U.S.C. 7301.

utilization of private contractors' employees to displace civil service employees has reached the point where the individual appellants and hundreds of other civil service employees in the class they represent herein were faced with the immediate loss of their civil service positions, at a time when NASA continued to employ thousands of contractor employees in the same or similar positions at the Marshall Center; and indeed, at a time when NASA proposed to replace the removed civil service employees with personnel supplied by private contractors.

Consequently, in a case of this nature, where appellants are seeking declaratory and injunctive relief against NASA to restrain and prevent such "*unlawful competition*", cases such as *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118, *Alabama Power Co. v. Ickes*, 302 U.S. 464 and *Perkins v. Lerkins Steel Co.*, 310 U.S. 113, have no relevance whatsoever. In these circumstances, it is settled that when a government agency or official is involved in a plan or program whereby contracts, corporate forms or other evasive, unlawful devices are being used for the purpose of violating, defeating or circumventing the requirements of federal statutes or to defeat rights created by federal law, the federal courts will intercede and grant all relief necessary to forestall the unlawful arrangements or the intended illegal result (*Northern Securities Company v. United States*, 193 U.S. 197; *Alabama Power Company v. Federal Power Commission*, CCA, D.C., 94 F. 2d. 601. *First National Bank of Logan v. Walker Bank & Trust Company*, 17 L.Ed. 2d. 343; *Union Savings Bank of Patchogue v. Saxon*, D.C. App. 1964, 335 F. 2d. 718; *Commercial State Bank v. Gidney*, D.C., D.C., 1959, 174 F. Supp. 770, aff'd. 278 F. 2d. 871; *Saxon v. Bank of New Orleans & Trust Company*, CCA, D.C. 1963, 323 F. 2d. 290, reversed on other grounds, 376 U.S. 948; *Baker, Watts & Co. v. Saxon*, D.C., D.C., 1966, 261 F. Supp. 247).

The Unlawful Contract Arrangements At The Marshall Center Frustrate And Defeat The Civil Service Retention Preference Laws And The Entire Civil Service Merit System: And Now Same Have Resulted In The Illegal Removal Of 166 Civil Service Employees From Their Positions. Their Work Thereafter To Be Performed By Competing Contractor Employees With No Federal Retention Rights Whatsoever.

In his opinion, the General Counsel to the Civil Service Commission states (J.A. 300, 301):

“... it has been the Civil Service Commission's experience that the procurement and use of personnel by unauthorized contracting practices have an adverse impact upon the Civil Service system and tends to frustrate the purposes and national policies expressed by the personnel laws. The extensive use of contractor-supplied personnel for the performance of Government missions poses issues of critical importance to our system of government, to any meaningful concept of “public service” and to the continuing vitality of the civil service system.”

The case at bar, of course, presents a classic example of what the Commission's Counsel was attempting to describe. Here, 166 federal civil service employees, *some (like the plaintiffs) with more than 20 years of federal civil service retention credits*, have been removed from their positions; and, as alleged in the complaint, their work and functions have simply been assigned by NASA to competing contractor employees, none of whom have any federal civil service retention rights whatsoever.

The complaint in this case thus alleges that these actions by NASA violate—

1) those provisions of the 1958 NASA statute which require NASA to perform its work functions with federal civil service employees (42 U.S.C. 2473 (b) (2)), and

2) those provisions of 5 U.S.C. § 3502 (b) which require that “a preference eligible employee . . . is entitled to be retained in preference to other competing employees”—

it being appellants' contention that the contract arrangements whereby NASA discharges preference eligible employees for the purpose of replacing them with private contractor employees are intended to circumvent, frustrate and defeat the statutory requirements of 5 U.S.C. 3502 (b), and that in this case, they have indeed been applied by NASA so as to circumvent, frustrate and defeat 5 U.S.C. 3502 (b). Indeed, as Judge Holtzoff stated just before he granted the Preliminary Injunction in this case: "You might as well do away with the Civil Service law if that practice is accepted;" and

3) those provisions of the collective bargaining agreement between NASA and Lodge 1858 which require NASA to carry out all reductions-in-force "in strict compliance with applicable laws and regulations."

In its brief, however, NCTSI, by attempting to elevate form over substance, contends the complaint herein must nevertheless be dismissed because allegedly "civil servants' preference rights under Section 3502 extend *only* to other Government employees" (NCTSI brief, pg. 17); and that NASA, as a matter of "policy", has the right to dismiss federal civil service employees with 20 to 30 years of statutory retention rights and to replace them with private contractor employees, if it so desires (NCTSI brief, pp. 31-34).

But, it is settled in this Circuit that "Realities, in short, and not mere forms must be considered by the courts . . ." (*Francis O. Day Co. v. Shapiro*, CCA, D.C., 1959, 267 F. 2d 669, 673); and that "The nature of (an) arrangement, and not the label applied to it, determines the character of (a) relationship . . ." (*Whitney National Bank v. Bank of New Orleans & Trust Company*, CCA, D.C., 1963, 323 F.2d 290, reversed on other grounds, 376 U.S. 948).

Indeed, in two previous cases involving federal reductions-in-force and contentions somewhat similar to NCTSI's, this Court has made it crystal clear that "policy" determinations by the head of a federal agency cannot

be used to defeat the clearcut civil service retention preference requirements of federal law (*Reynolds v. Lovett*, CCA, D.C., 1951, 201 F.2d 181, cert. denied, 345 U.S. 926; *Roth v. Brownell*, CCA, D.C., 1954, 215 F.2d 500, cert. denied, 348 U.S. 863). In *Reynolds v. Lovett*, the Navy, like NASA in the instant case, elected arbitrarily, wilfully and capriciously to ignore the federal civil service laws and the valid retention rights of its preference employees under 5 U.S.C. 3502. There, the Navy contended that the Commander of the Mare Island Naval Shipyard had the right to ignore Section 3502 and to retain non-preference employees while he simultaneously removed preference civil service employees from their positions. The Navy, like NASA and NCTSI in this case, argued that this could be done as a matter of "policy" because, in the Commander's judgment, the non-preference employees allegedly were better "qualified for the supervisory nucleus, composed of the best craftsmen". This court reversed a District Court judgment in favor of the Navy, stating at page 181:

"We think that appellees' view that when personnel is reduced, the head of an agency may select employees to be retained in any classification on the basis of individual merit and without giving effect to Section 12 of the Veterans Preference Act is erroneous."

In his concurring opinion, Circuit Judge Clark made the following observations which seem so pertinent to the case at bar, at page 182:

"... I think that the language used by the majority is altogether too lenient for the flagrant disregard of law exhibited by the Secretary of the Navy.

"Only one question is presented in this appeal—Can the Secretary of the Navy, or any other administrative official, deliberately flout the will of Congress clearly and without ambiguity expressed in the law of the land! . . .

"Counsel for appellee stated that the statute was not followed because "the Secretary of the Navy had

changed *his* policy". The Secretary changed *his* policy, forsooth. Not one word was forthcoming as to any change in the policy of Congress, which is the law. In my judgment, the defiance of the law and disregard of the will of Congress on the part of administrative bureaucrats is a greater menace to our institutions than the threat of the atomic bomb."

As stated before, the Supreme Court denied certiorari in *Reynolds v. Lovett*.

Thereafter, in *Roth v. Brownell, supra*, the plaintiff, a federal civil service employee, was removed from his position by a new Attorney General in the Department of Justice. He brought suit against the Attorney General, contending that his removal violated Title 5 of the United States Code and applicable Regulations of the Civil Service Commission. The Court of Appeals again ruled that the District Court had jurisdiction to review plaintiff's removal, and it thereupon held, at page 502:

"In our opinion, the plaintiff was entitled to a summary judgment that his removal from his position was not in accordance with law and that he should be restored to that position."

As indicated above, the Verified Complaint in this case alleges that NASA's removal of the individual plaintiffs and more than 160 other federal civil service employees violates not only 5 U.S.C. 3502, but 42 U.S.C. 2473 (b) (2), a provision of the *National Aeronautics and Space Act of 1958, as well*. The last mentioned statute contains the limitations within which NASA must operate to perform its functions for the Federal Government. In fact, 42 U.S.C. 2473 itself is entitled "Functions of the Administration". Section 2473 (a) provides that in order "to carry out the purpose of" Congress, NASA's functions shall be (1) to plan, direct and conduct aeronautical and space activities; (2) to arrange for participation by the scientific community in planning scientific measurements and observations to be made through use of space vehicles;

and (3) to provide information concerning its activities. Immediately following this Congressional definition of NASA's "*functions*" in section 2473 (a), Congress went on specifically to provide that *NASA was to perform those functions, with very limited, expressly stated exceptions, through federal employees appointed in accordance with the civil service laws and compensated in accordance with the Classification Act of 1949.* In this regard, 42 U.S.C. 2473 (b) (2) expressly states:

"(b) In the performance of its functions the Administration is authorized—

(2) to appoint and fix the compensation of such officers and employees as may be necessary to carry out such functions. *Such officers and employees shall be appointed in accordance with the civil service laws and their compensation fixed in accordance with the Classification Act of 1949, except that (a) to the extent the Administrator deems such action necessary to the discharge of his responsibilities, he may appoint not more than 425 of the scientific, engineering, and administrative personnel of the Administration without regard to such laws . . . and (b) to the extent the Administrator deems such action necessary to recruit specially qualified scientific and engineering talent, he may establish the entrance grade for scientific and engineering personnel without previous service in the Federal Government at a level up to two grades higher than the grade provided for such personnel under the General Schedule established by the Classification Act of 1949, and fix their compensation accordingly.*" (Emphasis supplied)

Thereafter, in 1961, when Congress passed an additional law, apparently requested by NASA and which authorized NASA to establish "not more than 12 scientific or professional positions to carry out research and development functions of the agency which require the services of specially qualified personnel", Congress again *expressly limited this exceptional grant as follows:*

(1) At 5 U.S.C. 3325: "Positions established under section 3104 of this title are *in the competitive service.*

However, appointments to the positions are made without competitive examination on approval of the qualifications of the proposed appointee by the Civil Service Commission. . . ."; and

(2) At 5 U.S.C. 3104: Even in addition to the restrictions provided by 5 U.S.C. 3325, NASA was further strictly limited by Congress to the creation of "*not more than 12*" new scientific and professional positions in this excepted category; and Congress instructed defendant Webb to report to it each year as to how he was administering these provisions of law.

Congress, therefore, has made it perfectly clear that NASA, like most other agencies of the Federal Government, is obligated to perform its delegated functions *with federal employees appointed in accordance with the Civil Service laws and paid, as federal employees, under the statutes passed by Congress*; and whenever NASA has sought any exception to this rule, Congress has reiterated its directive that NASA's employees, even those in scientific and other professional categories, must serve in the competitive service of the Federal Civil Service System.

Finally, appellants, in answer to the brief filed herein by the intervenor, NCTSI, contend that if the appellee Civil Service Commission continues to construe its own Regulations (5 C.F.R. 20.5), as NCTSI indicates they should be construed and as insufficient to protect the "Retention Preference" rights of the preference eligible civil service employees here involved against the unlawful retention (after their removal) of competing non-civil service employees with no retention rights whatsoever under federal law, then the Commission's present regulations clearly violate 5 U.S.C. 3501, 3502 in that they fail "*to give due effect*", as required by Congress, to "tenure of employment", "military preference", "length of service" and federal "performance ratings" among competing employees at the Center.

In this regard, 5 U.S.C. 3501 et seq. set forth the "Retention Preference" rights of competing employees for posi-

tions in a federal agency during a reduction-in-force. Section 3501 (b) states that said "Retention Preference" provisions apply "to each employee in or under an Executive agency". Section 3502 (a) then states:

"Order of Retention

(a) The Civil Service Commission shall prescribe regulations for the release of competing employees in a reduction in force *which give due effect to—*

- (1) tenure of employment;
- (2) military preference . . . ;
- (3) length of service; and
- (4) efficiency or performance ratings."

Section 3502 (b) then provides:

*"(b) A preference eligible employee whose efficiency or performance rating is "good" or "satisfactory" or better than "good" or "satisfactory" is entitled to be retained in preference to other competing employees. A preference eligible employee whose efficiency or performance rating is below "good" or "satisfactory" is entitled to be retained in preference to competing non-preference employees who have equal or lower efficiency or performance ratings."*³

In response to the Congressional directions contained in Section 3502 (a) the Civil Service Commission long ago promulgated "*Retention Preference*" regulations to govern reductions-in-force in the various federal agencies, including NASA. These regulations provide, at 5 C.F.R. 20.5 (b):

"(1) No employee may be separated, furloughed for more than thirty (30) days, or reduced in pay or grade in a reduction in force while a competing employee with lower retention standing (and without retention priority based on a statutory retention right) is retained in the same competitive level." (Emphasis supplied)

³ The term "*preference eligible employee*" is defined at 5 U.S.C. 7511 as a "permanent or indefinite preference eligible who has completed a probationary or trial period as an employee of an Executive Agency".

The Commission's regulations (5 C.F.R. 20.2 (c)) define "*competing employees*" as "the position incumbent, if any, and employees who are qualified for the position". The regulations (5 C.F.R. 20.2 (f)) likewise define "*competitive level*" as "all similar positions within a competitive area in which employees could be readily interchanged, without undue interruption of the work program". These same regulations (5 C.F.R. 20.2 (e)) define "*competitive area*" as that "part of an agency, usually within a local commuting area, in which employees are shifted . . . under single administrative authority, and within which competitive levels are established in reductions-in-force".

Patently, the entire purpose of the Congressional scheme embodied in 5 U.S.C. 3501, 3502, was to make it impossible for federal civil service employees with long retention credits and federal careers to be removed in favor of competing employees who possessed no such credits or civil service status whatsoever. And it is equally apparent that, if 5 U.S.C. 3501, 3502 can be ignored by any federal official anytime he desires to do so as a matter of "*personal policy*" or "*agency policy*", those statutes of the Congress will immediately become "dead letters" and the Civil Service System of the United States Government will become a meaningless farce and a dream of the past.

Clearly therefore, these issues and others are directly raised and presented for determination by the complaint in this action. They are important issues, not only to the appellants but to the entire Civil Service System of the United States. It was thus erroneous for the District Court to dismiss the complaint and to refuse to entertain and resolve those vital legal issues.

VI.

Upon A Motion To Dismiss. The Allegations Of The Complaint Are Taken As Admitted. And Thus NCTSI's Gratuitous, Unsupported Arguments Regarding The Government's Alleged Power To Contract For Support Services Are Not Properly Before This Court At This Time.

In its brief before this Court, the National Council of Technical Service Industries improperly endeavors to convince this Court that, before any evidence has been introduced in support of the verified complaint in this case and before the Government appellees have even filed an Answer to that complaint, this Court should reach the merits of this action and rule that "NASA and other Government agencies have full authority to contract for support services" (*NCTSI brief*, pgs. 20-30). Obviously, that question, which can only be reached and resolved after a trial on the merits in this case, is not before this Court for consideration at this time.

In the District Court, appellees filed their motion to dismiss the complaint under Rule 12 (b) of the Federal Rules before they served and filed an Answer to that complaint. Under those conditions, the rule to be applied is stated in Moore's Federal Practice, Vol. 2A, pgs. 2266, 67 as follows:

"The motion to dismiss under Rule 12 (b) . . . performs substantially the same function as the old common law demurrer A motion to dismiss is the usual and proper method of testing the legal sufficiency of the complaint. *For the purposes of the motion, the well-pleaded material allegations of the complaint are taken as admitted*" (Italics supplied)

In this regard, the verified complaint in this case, supported by reports of the General Accounting Office and an opinion of the General Counsel to the Civil Service Commission alleges with great specificity *that the removal of the individual appellants and the class they represent is*

unlawful; and that to the extent those removals involve replacement of federal civil service employees by private contractor employees, the NASA contract practices and procedures pursuant to which that result was accomplished are likewise unlawful. Those allegations, we submit, entitled appellants to maintain their complaint in the District Court and the Court erred when it granted the motion to dismiss. As stated further in Moore's Federal Practice, Vol. 2A, at pgs. 2271-74:

"... a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. Pleadings are to be liberally construed."

CONCLUSION

The judgment of the District Court should be reversed and this case remanded to that court for disposition on the merits of the complaint.

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